Supreme Court, U.S.
FILED

962026 JUN 24 1997

No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term 1996

DR. MARVIN DUNN,

Petitioner,

vs.

MIAMI HERALD PUBLISHING CO., a division of Knight-Ridder, Inc., a Florida corporation; and TOM DUBOCQ,

Respondents.

Petition For Writ Of Certiorari To The Third District Court Of Appeal Of Florida

PETITION FOR WRIT OF CERTIORARI

DR. MARVIN DUNN
3530 Crystal View Court
Miami, Florida 33133
(305) 857-9701

Submitted Pro Se

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

40PP

QUESTIONS PRESENTED

1. Whether the lower court, in upholding a trial court's grant of summary judgment in favor of defendants in a defamation suit, erred in relying on its opinion in *Stembridge v. Mintz*, 652 So.2d 444 (Fla.App. 3 Dist. 1995), which creates a wholesale exemption from defamation liability for statements of "opinion," in light of this Court's holding in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 110 S. Ct. 2695 (1990), which held that the First Amendment to the United States Constitution does not require a wholesale exemption from defamation liability for anything which might be labeled "opinion" given the already numerous existing protections afforded defendants in a defamation action.

2. Whether the statements at issue are capable of being proven false and thus actionable under this Court's holding in *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 106 S.Ct. 1558 (1986), which held that statements of opinion relating to matters of public concern which do not contain a provably false factual connotation are not actionable under state defamation laws.

LIST OF PARTIES

The parties to the proceedings are:

Petitioner:

Dr. Marvin Dunn

Respondents:

Miami Herald Publishing Co., a division of Knight-Ridder, Inc., a Florida corporation; and Tom Dubocq

TABLE OF CONTENTS

	Page
Questions Presented	i
List of Parties	ii
Table of Contents	iii
Table of Citations	v
Opinions Below	1
Jurisdiction	1
Constitutional Provision at Issue	1
Statement of the Case	2
Procedural Background	3
Reasons for Granting The Writ	6
I. THE LOWER COURT ERRED IN HOLDING THAT THERE EXISTS A WHOLESALE EXEMPTION FROM DEFAMATION LIABILITY FOR ANYTHING WHICH MIGHT BE LABELED "OPINION"	6
II. THE STATEMENTS PRINTED BY RESPONDENTS ARE ASSERTIONS OF OBJECTIVE FACT WHICH ARE CAPABLE OF BEING PROVEN FALSE, AND THUS ACTIONABLE UNDER THIS COURT'S HOLDING IN *PHILADELPHIA NEWSPAPERS, INC. v. HEPPS*	11
Conclusion	19
The decision of the Third District Court of Appeal of Florida	App. 1

TABLE OF CONTENTS – Continued

Page

The decision of the Honorable Murray Goldman of the Circuit Court for the 11th Judicial Circuit in and of Dade County, Florida.....App. 3

The decision of the Honorable Stuart M. Simons of the Circuit Court for the 11th Judicial Circuit in and of Dade County, Florida .....App. 8

Article: The Miami Herald, July 10, 1993.....App. 10

Editorial: The Miami Herald, July 17, 1993.....App. 14

TABLE OF CITATIONS

Page

CASES CITED:

Eastern Air Lines, Inc. v. Gellert, 428 So.2d 923 (Fla. 3d DCA 1983) 8, 9, 10

From v. Tallahassee Democrat, Inc., 400 So.2d 52 (Fla. 1st DCA 1981) 8

Gertz v. Robert Welch, Inc., 418 U.S. 323, 94 S.Ct. 2997 (1974) 6, 7, 9

Harte-Hanks Commissions, Inc. v. Connaughton, 491 U.S. 657, 109 S.Ct. 2678 (1989) 18

New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710 (1964) 16

Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 106 S.Ct. 1558 (1986) 11, 12

Milkovich v. Lorain Journal Co., 497 U.S. 1, 110 S.Ct. 2695 (1990) ..... *passim*

Stembridge v. Mintz, 652 So.2d 444 (Fla.App. 3 Dist. 1995) 5, 6, 7, 10, 11, 19

Zambrano v. Devanesan, 484 So.2d 603 (Fla.App. 4 Dist 1986) 8, 10

U.S. CONSTITUTION:

U.S. Const. Amend. I 1, 5, 8, 9, 10, 19

STATUTES CITED:

28 U.S.C. § 1257 1

OTHER AUTHORITIES:

Restatement (Second) of Torts, section 566 ..... 8, 11

Florida Supreme Court Manual of Internal Operating Procedures, section II.A.1.(a) 1

OPINIONS BELOW

The decision of the first trial judge denying Respondents' motion for summary judgment is not reported. It is reprinted in the appendix, App. 8. The decision of the second trial judge granting Respondents' motion for summary judgment after reconsideration is not reported. It is reprinted in the appendix, App. 3. The per curium decision of the Third District Court of Appeal of Florida affirming the grant of summary judgment is reprinted in the appendix, App. 1.

JURISDICTION

The district court of appeal handed down its per curium order affirming the grant of summary judgment in favor of Respondents on March 26, 1997. Appeal to the Supreme Court of Florida is precluded by section II.A.1.(a) of the Florida Supreme Court Manual of Internal Operating Procedures, which states that cases disposed of by the district courts of appeal without a written opinion are not reviewable. This Court has jurisdiction under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION AT ISSUE

United States Constitution Amendment 1:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to

peaceably assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

Petitioner Dr. Marvin Dunn was a highly respected leader in the African American community in South Florida. He was founder and principal of the Academy for Community Education ("Academy"), a community based alternative school for troubled children. The Academy was part of the Institute for Innovative Interventions, Inc. ("III"), an umbrella organization for which Dr. Dunn served as executive director. He held that position until July, 1993. Dr. Dunn is also an associate professor of psychology at Florida International University in Miami. Dr. Dunn concedes that he is a public figure for the purposes of this defamation action.

In early 1993, a disgruntled employee, Marjorie Rankin, began making complaints to the Board of Directors of III ("directors") and the State Attorney's Office regarding Dr. Dunn's operation of the Academy. As a result, the directors hired Julio Buzzi's accounting firm to perform an audit for the 1992 school year for the Academy.

Relations between Dr. Dunn and certain directors began to deteriorate and continued to deteriorate when Dr. Dunn began efforts to start a new entity, the Institute for Innovative Interventions, Inc. 2 ("III 2"), and made efforts to have the Academy moved from III to III 2. As a result, Dr. Dunn's resignation was sought by the directors and, ultimately, he was terminated for that reason.

Respondents took an interest in the activities of the Academy because one of their columnists, Liz Balmaseda, was related to a III director. On July 10, 1993, Respondents published an article, which is a subject of this lawsuit, that stated "directors of the Academy for Community Education voted late Thursday to seek Dr. Dunn's resignation after an auditor told them the school's financial books are a shambles." Thereafter, on July 17, 1993, Respondents published what purported to be an editorial, which is also a subject of this lawsuit, which stated, "Marvin Dunn, a private school administrator who put public funds to personal use, paid the price with his job."

PROCEDURAL BACKGROUND

On January 19, 1994, Petitioner filed his Complaint containing two counts for libel against Respondents. Count I claimed libel with respect to the July 10 newspaper article published by Respondents, and Count II claimed libel with respect to the July 17 editorial published by Respondents. The trial judge initially assigned to the case was the Honorable Stuart M. Simons. Respondents moved to dismiss the Complaint and the trial judge denied that motion. Thereafter, discovery proceeded.

After 16 months of discovery, in May of 1995, Respondents moved for summary judgment on substantially the same grounds as their previous motion to dismiss, but added the argument that the statements at issue were "protected opinion/fair comment." Petitioner opposed the motion arguing that the record reflected

genuine issues of material fact as to whether: (1) the July 10 statement and the July 17 statement were false; (2) Respondents knew the statements were false, or should have known they were false at the time they were published; and (3) the statements were protected opinion/ fair comment. Judge Simons, who by that time had presided over the case for more than 18 months, and who during that time had, *inter alia*, considered several motions and memoranda, heard numerous arguments, including lengthy oral argument on the motion for summary judgment, considered numerous affidavits and depositions, etc., denied Respondents' Motion for Summary Judgment. In his denial, Judge Simons specifically found that there were "genuine issues of fact existing as to all of the issues, including reckless disregard for falsity."

More than twenty (20) days later, on September 20, 1995, Respondents moved for reconsideration of the denial of summary judgment. Petitioner opposed reconsideration and, at the hearing on the motion for reconsideration, argued, *inter alia*, that it was untimely. On January 11, 1996, Judge Simons granted Respondents' Motion for Reconsideration, over petitioner's objections. Immediately thereafter, Judge Simons recused himself from the case. At the time of his recusal, Judge Simons had presided over the case for nearly two years. At no time prior to his recusing himself had any of parties, or the court, mentioned recusal.

On the same day as his recusal, Judge Simons set aside his order denying Respondents' Motion for Summary Judgment. The two-year-old case was then transferred to the Honorable Murray Goldman. Respondents

were then permitted to reargue their Motion for Summary Judgment. Judge Goldman, after presiding over the case for a little less than two (2) weeks, and considering the entire file, which by that time consisted of more than 1200 pages, found contrary to Judge Simons, and granted Respondents' motion for summary judgment. Judge Goldman then entered a Final Judgment in favor of Respondents. Petitioner moved for a rehearing but was denied. Judge Goldman based his decision in part upon his view that the statements in the articles were nonactionable opinion, and cited *Stembridge v. Mintz*, 652 So.2d 444 (Fla.App. 3 Dist. 1995), as support.

Petitioner made a timely appeal to the Third District Court of Appeal of Florida, which affirmed the grant of summary judgment in a per curium order. The court wrote no opinion and cited only its recent holding in *Stembridge*. The *Stembridge* decision was based solely on the ground that the defamatory statements in that case were nonactionable "protected opinion." Since the appellate court disposed of the case without opinion, appeal to the Supreme Court of Florida is not possible. This appeal followed. Petitioner now seeks review only as to the court of appeal ruling regarding the proper scope of the "opinion" protection afforded defendants in a defamation claim under the First Amendment.

REASONS FOR GRANTING THE WRIT

I. THE LOWER COURT ERRED IN HOLDING THAT THERE EXISTS A WHOLESALE EXEMPTION FROM DEFAMATION LIABILITY FOR ANYTHING WHICH MIGHT BE LABELED "OPINION"

In *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 110 S.Ct. 2695 (1990), this Court granted certiorari "to consider the important questions raised by the Ohio courts' recognition of a constitutionally required 'opinion' exception to the application of its defamation laws." 110 S.Ct. at 2701. *Milkovich* held that the Ohio court (as well as a number of other lower courts) developed this "opinion" exception based on a mistaken interpretation of this Court's dictum in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997 (1974). 110 S.Ct. at 2705. *Milkovich* further held that the First Amendment does not require a "wholesale defamation exemption for anything that might be labeled 'opinion'." 110 S.Ct. at 2705. "The breathing space which freedoms of expression require in order to survive is adequately secured by existing constitutional doctrine without the creation of an artificial dichotomy between 'opinion' and fact." 110 S.Ct. at 2706.

In the present case, a lower court has adopted a wholesale "opinion" exemption similar to the one reviewed and condemned by this Court in *Milkovich*. In affirming a grant of summary judgment in favor of Respondents, the court of appeal issued a per curium order which cites only *Stembridge v. Mintz*, 652 So.2d 444 (Fla.App. 3 Dist. 1995). The *Stembridge* court reversed a grant of partial summary judgment in favor of a plaintiff

in a defamation suit on the sole ground that the defamatory statements in that case were nonactionable "pure opinion." 652 So.2d at 447. However, the *Stembridge* opinion indirectly relies for its analysis on a certain passage of dictum from *Gertz*. This same *Gertz* dictum was the principle source behind the mistaken view that, in addition to all other Federal constitutional protections, there existed a separate protection for statements labeled "opinion." *Stembridge* perpetuates this mistaken interpretation, and creates a wholesale exemption from defamation liability for anything that might be labeled "opinion." *Stembridge* is clearly at odds with this Court's holding in *Milkovich*.

The facts of *Stembridge* are as follows: Stembridge brought an action against his insurance company. Mintz was counsel for the insurance company. Although the verdict in that case was in Stembridge's favor, he was unhappy with the result. Stembridge filed a form with the Florida Bar entitled "Inquiry/Complaint Form" ("Bar Inquiry"). In the Bar Inquiry Stembridge asked whether certain arguments made by Mintz in the previous Insurance Action gave rise to any problems as they relate to the rules regulating the Florida Bar. The Florida Bar responded that the complaint did not evidence that the accused attorney had acted unethically or in violation of the rules regulating the Florida Bar. Mintz then sued Stembridge for defamation based on the Bar Inquiry. Stembridge had sent copies of the Bar Inquiry to several third parties. Mintz alleged that he was defamed by the copies which were sent to these third parties.

The trial court granted partial summary judgment in favor of Mintz, and the court of appeal reversed. In reaching this decision, the *Stembridge* court stated that

"the determination whether a statement is fact or opinion is a question of law for resolution by the court." 652 So.2d at 447, quoting *Zambrano v. Devanesan*, 484 So.2d 603 (Fla.App. 4 Dist. 1986). The court then concluded that "on the merits" it agreed with Stembridge's argument that the content of the Bar Inquiry form was a "nonactionable statement of opinion." *Id.* at 446. As support for this proposition, the court quoted from section 566 of the Restatement (Second) of Torts, which provides:

> "A defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion."

The *Stembridge* opinion relies primarily on two older Florida cases, *Eastern Air Lines, Inc. v. Gellert*, 438 So.2d 923 (Fla.App. 3 Dist. 1983) and *From v. Tallahassee Democrat, Inc.*, 400 So.2d 52 (Fla.App. 1 Dist 1981), in order to "summarize the applicable principles" of section 566. 652 So.2d at 445. Both *Eastern Air Lines* and *From*, applying what appeared at the time to be settled law, sought to delineate when a defamatory statement is nonactionable "pure opinion" or actionable "mixed opinion." The difference between the two, according to *From*, turns on whether the facts upon which the "opinion" is based are disclosed in the article or otherwise known to the reader. *Stembridge*, 652 So.2d at 446 (quoting *From*, 400 So.2d at 57). At the time the courts handed down *Eastern Air Lines* and *From*, this fact/opinion inquiry was thought to be essential and necessary under the First Amendment.

The analysis from *Eastern Air Lines* and *From*, however, is simply no longer good law. In fact, it never was.

These two decisions, it is important to note, were handed down years prior to *Milkovich*, and have been overruled by it. Both cases also make the mistake of citing *Gertz* as support for their position that this fact/opinion analysis is required under the First Amendment. *From* goes even further and quotes the very same dictum in *Gertz* which this Court held in *Milkovich* to be the cause of this confusion. The passage reads:

> Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. *From*, 400 So.2d at 56 (quoting *Gertz*, 94 S.Ct. at 3007).

Eastern Air Lines and *From* interpreted the above passage as requiring an inquiry into whether a defamatory statement is "fact" or "opinion." The Respondents in *Milkovich* also tried to convince this Court that the First Amendment mandates an inquiry into whether a defamatory statement is "opinion" or "fact." 110 S.Ct. at 2706. This Court flatly rejected such an inquiry. The Court acknowledged that many lower courts, in reliance on *Gertz*, had developed a number of factors over the years to be considered in deciding whether a statement is "fact" or "opinion." 110 S.Ct. at 2706. However, this Court overruled those prior cases because this interpretation of *Gertz* was a mistake. *Id. Milkovich* should have put an end to the perception – as it turns out, misperception – traceable to this dictum in *Gertz* that, in addition to all other Federal constitutional protections, there exists a wholesale defamation exemption for anything that might be labeled "opinion." Nonetheless the court of appeal in the

present case relied on overruled, pre-*Milkovich* "opinion" law and affirmed the grant of summary judgment in favor of Respondents. This was reversible error.

The court of appeal in the present case made no findings on the issues of falsity or actual malice. It instead relied on *Stembridge*, which held that "the determination whether a statement is fact or opinion is a question of law for resolution by the court," and decided the present case on that erroneous basis alone. 653 So.2d at 447 (quoting *Zambrano*, 484 So.2d at 606). The *Stembridge* court seemed to believe that a defamation suit could be – and under the First Amendment must be – disposed of with a simple finding that the alleged defamatory statements are "opinion" as opposed to "fact." This is not so. Just as with *Eastern Air Lines* and *From*, the *Zambrano* decision was handed down years prior to *Milkovich*. Courts at that time believed that this fact/opinion inquiry was constitutionally required. It is not. Thus this is another example of the *Stembridge* court quoting pre-*Milkovich* "opinion" law, believing it to be necessary, when in fact it has been rejected by this Court as too simplistic.

Once we do away with the notion that there exists an additional separate constitutional privilege for "opinion," the dispositive question becomes whether a reasonable factfinder could conclude that the statements printed by Respondents imply the assertions that (1) petitioner's financial management of the school was extremely poor, an auditor told the Board that the school's financial books were a shambles, and the Board fired Petitioner for this reason; and (2) Petitioner put public funds to personal

use, was caught, and was ultimately fired for it. *Milkovich*, 110 S.Ct. at 2707. It is clear that the statements printed by Respondents do imply both assertions. This is not the sort of "loose, figurative, or hyperbolic language" which would negate the impression that the newspaper was seriously maintaining that Petitioner both mismanaged the school's financial books and misused public money. *Id.* Nor does the general tenor of the articles negate this impression. *Id.*

II. THE STATEMENTS PRINTED BY RESPONDENTS ARE ASSERTIONS OF OBJECTIVE FACT WHICH ARE CAPABLE OF BEING PROVEN FALSE, AND THUS ACTIONABLE UNDER THIS COURT'S HOLDING IN *PHILADELPHIA NEWSPAPERS, INC. v. HEPPS*

Although there is no wholesale exemption from defamation liability for statements labeled "opinion," this Court did articulate a test in *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 106 S.Ct. 1558 (1986), for what types of statements may not give rise to defamation liability. Section 566 of the Restatement (Second) of Torts (which was adopted by the court in *Stembridge*) also sets out a test for when a statement is nonactionable. However, this Court's test and the Restatement's test are in conflict.

Section 566 seems to grant immunity to defamatory statements in the form of an opinion so long as the speaker discloses the facts upon which the opinion is based. However, according to *Milkovich*, "even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his

assessment of them is erroneous, the statement may still imply a false assertion of fact." 110 S.Ct. at 2706. Section 566 of the Restatement thus does not set out the same standard which this Court articulated in *Hepps*, and reaffirmed in *Milkovich*. "*Hepps* ensures that a statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection." *Milkovich*, 110 S.Ct. at 2706. The statements made by Respondents in this case do not qualify. Although the statements do relate to matters of public concern (since it is alleged that Petitioner misused public money), those statements are not entitled to protection under *Hepps* because they are provable as false.

Petitioner is specifically suing on two defamatory statements printed by Respondents, both of which are clearly provable as false: (1) "directors of the Academy for Community Education voted late Thursday to seek Dr. Dunn's resignation after an auditor told them that the school's financial books are a shambles"; and (2) "Marvin Dunn, a private school administrator who put public funds to personal use, paid the price with his job."

Both of the above statements are false in two respects. First, they both purport to list a reason for petitioner's termination. The reason for petitioner's termination is an assertion of objective fact which is capable of being proven either true or false. Second, the statements are false because (1) an auditor did *not* in fact tell the "directors" that the books were a "shambles" and (2) Petitioner did *not* in fact put public funds to personal use. These, too, are assertions of objective fact which are capable of being proven either true or false. Petitioner has

ample evidence in the record to raise a genuine issue of fact regarding the falsity of these statements on both levels. Such evidence includes, but is not limited to, the following:

1) Contradictory testimony by the key witness in the case, the auditor, Julio Buzzi, who testified in his deposition that he told the directors that he was unable to establish that public funds had been put to personal use. Several months later, after being contacted by attorneys for Respondents, Mr. Buzzi changed his testimony and provided an affidavit for Respondents in which he swore that he did tell the directors Petitioner had put public funds to personal use.

2) In his deposition Mr. Buzzi was asked if he included in his final report to the directors that Petitioner had put public funds to personal use. He responded, "Absolutely not."

3) Attorneys for Respondents contacted five of the directors who provided Respondents with false, after-the-fact affidavits in which they swore that the auditor told them that Petitioner put public funds to personal use and that Petitioner was fired for that reason. Yet, in his deposition the auditor testified that these specific individuals were among the directors whom he expressly told that he could not establish that Petitioner put public funds to personal use.

4) Mr. Buzzi's notes regarding the audit of the school in which he wrote that he told the directors that he was unable to document personal use of public funds and that the school's financial records were "in good order."

5) A videotape of the president of III appearing before the Dade County School Board at which time he told the School Board that Petitioner was not terminated for misuse of money. He said that Petitioner was terminated because he was starting a new board. Several months later the president provided an affidavit for Respondents in which he stated that Petitioner was terminated for misuse of funds.

6) The secretary of III who testified in her deposition that the directors never determined that Petitioner put public funds to personal use and that Petitioner was terminated for starting a new board. She later provided an affidavit for Respondents in which she stated that Petitioner was terminated for misuse of funds.

7) Another director, III's chief financial officer, was quoted in an article by Respondents in which the director stated that Petitioner was terminated for starting a new board. She made no reference to misuse of funds. Months later, after being contacted by attorneys for Respondents, this director provided an affidavit for Respondents in which she stated that Petitioner was terminated for misuse of public funds.

8) Petitioner's letter of termination makes no reference to personal use of public funds. The letter does mention starting a new board as the reason for the termination. Respondents had a copy of this document prior to publishing the offending editorial.

9) The organization passed its 1992 audit by Mr. Buzzi. This would not have been possible if public funds had been put to personal use. Respondents knew that the

organization had passed its audit when they printed the offending editorial.

The article and editorial did list several "facts" upon which Respondents supposedly based these "opinions." However, "even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact." *Milkovich*, 110 S.Ct. at 2706. Many of the "facts" upon which Respondents purport to have relied in printing these statements are at best incomplete, and at worse false. Petitioner has ample evidence in the record to raise a genuine issue of fact regarding whether these "facts" are either incomplete or false, and whether Respondents knew or should have known that these "facts" were incomplete or false. This evidence includes, but is not limited to, the following:

1) The statement in the article that Russel Wheatley was "furious" about the purchase of tickets to a reception is blatantly false. Mr. Wheatley testified that he was not furious, that he told the reporter that he was not furious and that Petitioner had done nothing wrong in the purchase of the tickets. He said the reporter "baited" him and showed an undue interest in Petitioner's sex life.

2) Respondents reported that Petitioner put public funds to personal use by financing a "long weekend" in California in 1992. But during his deposition Mr. Buzzi testified that this was not an example of public funds put to personal use by anyone. The chief auditor for the school system testified that he did not find that Petitioner

put public funds to personal use on this trip. Mr. Wheatley, who supervises the school for the public school system, also testified that public funds were not misused during this trip.

3) Respondents reported that Petitioner put public funds to personal use by placing two tires on his personal van to take students and staff members on an approved trip to Tennessee. Respondents did not report that the directors pre-approved the use of petitioner's van for official school business including transporting students and staff.

4) Respondents asserted that Petitioner put public funds to personal use by paying a former political aide to teach his classes at the university. Respondents did not report that the directors approved the employment of this individual who covered classes for Petitioner twice in three years while Petitioner was traveling on official III related business. Nor did Respondents report that this person was academically qualified to substitute for Petitioner.

5) Respondents claimed that Petitioner put public funds to personal use by making a political campaign contribution of fifty dollars. The auditor noted that this is not allowed under IRS rules. Petitioner voluntarily advised the auditor that actually about three hundred dollars were involved. He then provided documentation that showed that the funds involved were private, not public funds, and that the organization had been fully reimbursed.

Petitioner concedes that he is a public figure and thus required to demonstrate actual malice. *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710 (1964). Petitioner has

ample evidence in the record to raise a genuine issue of fact regarding whether Respondents knew or should have known that the defamatory statements were false when printed. Evidence of such malice includes, but is not limited to, the following:

1) In explaining the basis for his defamatory article, the reporter lied to his superiors telling them that Petitioner had illegally spent thousands of dollars on a personal trip to Tennessee in 1992 with the school's assistant principal and used only a scrap of paper to reimburse himself. In fact, this was a school trip approved by the directors and the School Board, and involved dozens of students and staff members. The reporter knew this and had been given all of the proper documentation relating to the trip. He intentionally withheld that information from his superiors.

2) Respondents printed an article, not subject to this lawsuit, only days preceding the offending editorial, in which a director gave the only articulated reason for the dismissal. She stated that Petitioner was terminated because he was starting a new board. The editorial writer testified that she read this article and relied upon it in preparing her editorial, however she chose not to state that this was the reason for the termination. The executive editor testified that he also read the article and approved the editorial as printed because the public would have been more interested in the firing for personal use of public funds.

3) The reporter lied to his superiors in writing, telling them that the chief auditor for the school system "was appalled" at the condition of the school's financial

records. The auditor testified in deposition that he never expressed an opinion to the reporter regarding the condition of the school's records and that his office did not find that public funds had been put to personal use.

4) Prior to writing the editorial, the editorial writer declined to accept relevant documents from Petitioner which would have given her pause to write that Petitioner was fired for putting public funds to personal use.

5) Respondents disregarded a statement on its own pages by III's chief financial officer who said that Petitioner was terminated for starting a new board.

6) Respondents were able to obtain an affidavit from the Chairperson of the Dade County School Board during the year in question who swore that *if* the facts stated in the Herald article were true, it would be of concern to her. Respondents however, have consistently misrepresented her statement by omitting the phrase "if the facts are true."

After over two years of discovery, Respondents have no documented evidence of personal use of public funds by Petitioner.

The proper inquiry at the appellate level should have been whether a reasonable jury could find from the above evidence both falsity and actual malice. "The question whether evidence in the record in a defamation case is sufficient to support a finding of actual malice is a question of law." *Milkovich*, 110 S.Ct at 2705 (quoting *Harte-Hanks Commissions, Inc. v. Connaughton*, 491 U.S. 657, 685, 109 S.Ct. 2678, 2694 (1989). The lower court, however, believed that the question of law to be decided was

whether the statements were "fact" or "opinion." *Stembridge*, 652 So.2d, at 447. It thus never made any findings on the issues of falsity or actual malice. However, this Court has held that such fact/opinion considerations are unnecessary under the First Amendment. "We are not persuaded that . . . an additional separate constitutional privilege for 'opinion' is required to ensure the freedom of expression guaranteed by the First Amendment." *Milkovich*, 110 S.Ct. at 2707.

CONCLUSION

For all of the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

DR. MARVIN DUNN
3530 Crystal View Court
Miami, Florida 33133
(305) 857-9701

Submitted Pro Se

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT
OF APPEAL

OF FLORIDA

THIRD DISTRICT

JANUARY TERM, A.D. 1997

MARVIN DUNN, Appellant, vs. THE MIAMI HERALD PUBLISHING CO., a Division of Knight-Ridder, Inc., a Florida corporation; and TOM DUBOCQ, Appellees.	** ** ** ** ** ** ** ** ** ** ** **	CASE NO. 96-454 LOWER TRIBUNAL NO. 94-1156

Opinion filed March 26, 1997.

An Appeal from the Circuit Court for Dade County, Murray Goldman, Judge.

Bienstock & Clark, and Terry S. Bienstock, and Kimberly A. Levine, for appellant.

Jerold I. Budney; Holland & Knight, and Sanford L. Bohrer, and Judith M. Mercier, for appellees.

Before LEVY, GERSTEN, and GREEN, JJ.

PER CURIAM.

Affirmed. *See Stembridge v. Mintz*, 652 So. 2d 444 (Fla. 3d DCA 1995).

IN THE CIRCUIT COURT FOR THE
11TH JUDICIAL CIRCUIT, IN AND
FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO.: 94-1156 CA (30)

MARVIN DUNN,

Plaintiff,

vs.

MIAMI HERALD PUBLISHING COMPANY, a Division of Knight-Ridder, Inc., a Florida corporation; and TOM DUBOCQ,

Defendants.

_____/

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

(Filed Jan. 30, 1996)

This cause came before the Court on Defendants' Motion For Summary Judgment. The Court has reviewed the entire file, including everything filed by the parties in connection with the Motion, and heard argument of counsel. The Court has viewed the evidence in the manner most favorable to Plaintiff. The Court has determined (1) there is no genuine issue of material fact, and (2) Defendants are entitled to judgment as a matter of law for the reasons set forth below.

1. This is an action for defamation. Plaintiff Marvin Dunn ("Dunn") bases his suit on one statement made in a July 10, 1993 **Miami Herald** article (the "Atricle") and one

statement made in a July 17, 1993 **Miami Herald** editorial (the "Editorial"), both relating to Dunn's loss of his position as Executive Director of a school known as the Academy for Community Education (the "Academy").

2. Plaintiff concedes he is a "public figure" under the law governing this action.

3. Although a defamation cause of action is a common law tort, under the First Amendment, special protections exist for the press where a public figure is the plaintiff. Thus, to prevail on either statement, the First Amendment to the United States Constitution requires that Dunn prove it is a false and defamatory statement of fact about him and that Defendants published such statement either with knowledge of its falsity or with "reckless disregard" of is falsity. *Masson v. New Yorker Magazine,* ___ U.S. ___, 11 S.Ct. 2419 (1991), *Lampkin-Asam v. Miami Daily News, Inc.,* 408 So.2d 666 (Fla. 3d DCA 1982), *rev. denied,* 417 So.2d 329, *cert. denied,* 459 U.S. 806 (1982). The U.S. Supreme Court has defined "reckless disregard" as "a high degree of awareness of probable falsity" or "serious doubts as to the truth" of what was about to be published. *Masson v. New Yorker Magazine, supra.* A plaintiff must prove such knowledge or recklessness with "clear and convincing evidence." *Lampkin-Asam v. Miami Daily News, Inc., supra, Bose Corporation v. Consumers Union,* 446 U.S. 485 (1984). Under the First Amendment, this Court must assure itself from an independent review of the record that "the evidence is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof" of a knowing or reckless publication of a falsehood. *Bose Corporation v. Consumers Union, supra,* 446

U.S. at 511. Finally, Florida's appellate courts have indicated summary judgment is "especially appropriate in libel cases where the facts are not essentially in dispute because of the chilling effect of libel suits on First Amendment freedoms." *Karp v. Miami Herald Publishing Co.*, 359 So.2d 580, 581 (Fla. 3d DCA 1978). See also, *Menendez v. Key West Newspaper Corp.*, 293 So.2d 751, 752 (Fla. 3d DCA 1974) ("summary judgments should be more liberally granted" in public figure libel suits); *Della-Donna v. Gore Newspapers Co.*, 510 So.2d 984 (Fla. 4th DCA 1987) ("summary judgments should be liberally granted in libel cases" "where there is a lack of clear and convincing evidence" of knowing falsity or a high degree of awareness of probable falsity); *Cronley v. Pensacola News-Journal*, 561 So.2d 402, 405 (Fla. 1st DCA 1990) ("summary judgments are to be liberally granted"). Even if it were not the case that summary judgments are to be liberally granted, the Court has determined summary judgment should be entered for the same reasons it should be entered in any lawsuit: there is no genuine issue of material fact and Defendants are entitled to judgment as a matter of law.

4. The record indicates without issue that both statements sued upon are true statements of fact, which means Defendants are entitled to summary judgment. A cause of action for defamation cannot be sustained if the statements giving rise to the claim are true. See, e.g., *Appestein v. Knight Newspapers, Inc.*, 337 So.2d 1005 (Fla. 3d DCA 1976) and *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986). Defendants are also entitled to summary judgment even if a false statement of fact had been published, because the record indicates, assuming the

statements at issue to be false, and viewing the evidence most favorably to Dunn, that neither statement was made with knowledge or reckless disregard of such falsity, and Dunn cannot show with convincing clarity such knowing or reckless behavior. (See *Slomowitz v. Walker,* 429 So.2d 797, 800 (Fla. 4th DCA 1983), defining clear and convincing to be evidence "of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.") For example, the statement in the Article reports that the Academy's board voted to seek Plaintiff's resignation from his position at the Academy after an auditor reported to the board that the books of the Academy were in a shambles. Five board members testified in this case. All five said the statement accurately reports what they did and what the auditor communicated to them. In his testimony, the auditor said the statement accurately reports what he said. It is the same with the statement in the Editorial. The statement in the Editorial indicates Dunn used public funds for personal use and lost his job as a result. Again, the five board members testified the statement was accurate, and with regard to the assertion of personal use of public funds, the auditor's affidavit, quoting from and referring to findings in his audit reports, points out several instances of personal use and states the auditor told board members it appeared to him Dunn had made personal use of public funds. Finally, when asked by the Miami Herald reporter writing the Article for her reaction to some of the instances identified by the auditor, then Dade County School Board Chair Janet McAliley indicated if what was being told was true, it would be "of concern to me. Public

dollars shouldn't be spent on personal expenses." Ms. McAliley provided an affidavit supporting Defendants. The Court has considered all the evidence submitted on behalf of Dunn and Found it is insufficient to enable him to prove publication of a knowing or reckless falsehood with convincing clarity.

5. Alternatively, the statement in the Editorial is a statement of opinion or fair comment, not a statement of fact. The Editorial recites a series of instances of personal use of public funds by Dunn, including instances identified by the auditor (Dunn has not sued on those statements of fact) as the basis for the statement sued upon. The statement at issue appear to be a conclusion drawn by the writer based on the facts set forth in the Editorial. An allegedly defamatory statement in the form of an opinion may be "actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion." *Stembridge v. Mintz*, 652 So.2d 444 (Fla. 3d DCA 1995). *Scandinavian World Cruises (Bahamas) Ltd. v. Ergle*, 525 So.2d 1012 (Fla. 4th DCA), *rev. denied*, 536 So.2d 244 (Fla. 1988).

6. Defendants' Motion For Summary Judgment is therefore GRANTED. The Court has entered a Final Judgment this day in Defendants' favor.

ORDERED at Miami, Florida, this 30 day of January, 1996.

/s/ Murray Goldman
CIRCUIT COURT JUDGE

Copies:
Sanford L. Bohrer
Ira Hershkowitz

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA.

GENERAL JURISDICTION DIVISION

CASE NO. 94-1156 CA 03

MARVIN DUNN,

Plaintiff,

v.

MIAMI HERALD PUBLISHING COMPANY, etc., et al.,

Defendants.
_____/

ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

THIS CAUSE came on to be heard on June 6, 1995, on Defendants' Motion for Summary Judgment, and the Court having heard argument, having examined all of the memoranda supplied and finding that genuine issues of fact exist as to all of the issues made by the Motion for Summary Judgment and as argued in the respective memoranda, including the issues of "reckless disregard of falsity," and being otherwise duly advised in the premises, it is hereby

ORDERED AND ADJUDGED that Defendants' Motions for Summary Judgment is DENIED.

DONE AND ORDERED in Chambers at Miami, Dade County, Florida, this 31 day of August, 1995.

/s/ Stuart M. Simons
STUART M. SIMONS,
CIRCUIT JUDGE

True copies furnished to:

Sanford L. Bohrer, Esquire
Ira I. Herskowitz, Esquire

Article: The Miami Herald, July 10, 1993

"Principal's resignation sought:
Academy misuse of funds alleged"
By Tom Dubocq

Marvin Dunn, the prominent civic activist and university professor, is being pressured to resign from his school-principal job amid allegations that he mismanaged tax money intended to help troubled students.

Directors of the Academy for Community Education voted late Thursday to seek Dunn's resignation after an auditor told them the school's financial books were a shambles. At the same Board meeting, Dunn reported that the Academy is going broke.

Accountants and schools [sic] directors are questioning several thousand dollars in expenditures. Among them: IRS-prohibited political contributions, payments for a substitute teacher to cover Dunn's university classes, and a hotel bill for a long weekend in San Francisco last summer. The registered guests: Dunn, the Academy's assistant principal and her daughter.

Dunn contended Friday that he's done nothing improper. He said he intends to resign from his $61,000-a-year academy post – but on his own terms, "once the air has been cleared."

He acknowledged some spending mistakes, but he contends the bulk of the allegations against him are unfounded and are a vendetta.

"I have not misspent any money," Dunn told The Herald. "Basically, this is a power struggle."

The Academy is a small, highly regarded program for potential high school dropouts that Dunn founded a dozen years ago. It receives most of its funding from the Dade School Board.

Now the school system is hesitant to renew its $ 660,000-a-year contract. The district wants all of the Academy's problems cleared up.

"I don't have a full picture," School Board Chairperson Janet McAliley said Thursday. "It is of concern to me. Public dollars shouldn't be spent on personal expenses."

If problems persist, McAliley said, the district may take over the program. That would be relatively simple because the academy is staffed with school system teachers, and is housed in the district's Merrick Educational Center in Coral Gables.

The academy is operated by a non profit company, the Institute for Innovative Interventions, which is run by a board of volunteers. Dunn is the executive director.

The problems erupted early this year, when the school's former business manager complained to the directors – and was promptly ordered on administrative leave by Dunn. Dunn said she had bucked the chain of command and made unfounded allegations.

The situation went downhill from there, said Warren Hoskins, the academy's chairman. "We went from a board in January that was giving Marvin everything to a board in July that is seeking his resignation," Hoskins said Friday. "I'm heartbroken the way this has come down to a lack of trust."

The academy's directors brought in two accountants to examine the books. They found, among other things, that financial records were in disarray, and mandatory IRS filings had not been filed. Lots of expenditures – including gifts, bonuses and loans to employees – were lacking supporting documentation, they said.

Reports of the accountants, and other school records show:

- Monthly $200 payments to Robert Loring, a former political aide of Dunn and Assistant Principal Andrea Loring's ex-husband. Robert Loring said he performs a variety of computer services for the school. He also covers Dunn's classes at Florida International University when Dunn is tied up.

The accountants also questioned why the academy's office staff was logging grades for Dunn's college students who work as unpaid interns.

Dunn, paid $44,000 a year by FIU, said Loring rarely taught his class. He said the academy benefited from the work of his college interns.

- A $346 bill from the Crown Sterling Suites in San Francisco for a three-day stay last August. Dunn and Assistant Principal Loring said they checked into the hotel after attending an academic conference. Dunn said he stayed in San Francisco to "network" with West Coast contacts to learn new fund-raising methods for a public housing project he's developing.

Loring said she never slept in the suite, just used the hotel's exercise room to wind down until her plane ride

to Miami. "After a five-day conference, I needed a workout," she said.

The academy paid their expenses on the trip, about $2,100 for meals, jet fares, car rental and a $50 parking ticket Loring got while in California. Loring paid her child's air fare, she said.

- About $400 in political campaign contributions. Under IRS rules, the tax-exempt school is prohibited from giving money to political candidates. Dunn said he didn't know it was illegal and will reimburse the school.

- $70 for two tickets to a party last year for Associate Superintendent Russell Wheatley, the academy's supervisor at district headquarters. The private affair was at the exclusive Villa Woodbine in Coconut Grove. Wheatley said he was furious that the academy paid. "I saw it as a school-related activity," said Loring, who bought the two tickets.

Dunn said that by resigning he isn't trying to escape the academy's financial difficulties, only its directors. He said he wants to start fresh – with a new nonprofit corporation and new bosses – and take over the academy's dropout prevention program and other public service projects.

"I cannot continue to work for this organization," Dunn wrote Thursday to School Board Chairwoman McAliley. "This school is the primary focus of my professional life and that of other staff members who are demoralized. We will and must leave."

Editorial: The Miami Herald, July 17, 1993

"A School Gets An Education"

When bad business is practiced in the name of good business, there is almost always a price to pay. When public money fuels such practices, the penalty must be all the more exacting.

Marvin Dunn, a private school administrator who put public funds to personal use, paid the price with his job. An educator who has earned the trust and respect of Dade's academic community, Mr. Dunn recently was fired as executive director of the Academy for Community Education when auditors had trouble reconciling its financial records. He had refused to resign.

The academy's board of directors had no other choice. When told that the school's accounts were in questionable shape, they took action swift and, it is hoped, remedial. Now their subsequent actions will be just as important. They aren't the first board members of a publicly funded nonprofit agency to be caught unaware by long-brewing fiscal or administrative problems.

The academy receives funding from the Dade County Schools. With some of those funds, Mr. Dunn was paying a former political aide to teach his classes at Florida International University. He financed a long weekend in San Francisco with the academy's assistant principal and her daughter *after* an academic conference ended. He bought tickets to a private dinner. He also contributed to political campaigns with money not legally available for that purpose. (He has since repaid those funds, he says.) Mr Dunn's errors, it appears, were ones of judgment, not of criminal intent.

Still, the school Board pays the academy $660,000 a year to help troubled, at-risk students – who may be victims of their own faulty judgment – get back on track. That mission and Mr. Dunn's actions were out of sync.

And what of the board members' mission? It is above all their responsibility *not* to be surprised by improprieties, certainly not to tolerate them, and to ensure that public funds are used frugally. For nonprofit and public agencies to emblazon in red letters, "What would an independent auditor say?" atop every expense form and every check, might not be going too far to drive the point home.

The school Board, belatedly, has taken corrective action. It recently instituted measures to mandate annual audits of the private agencies with which it contracts for educational services.

Now the academy's board members are searching for a new director. They may find it an opportunity for soul-searching as well. That's a form of regular preventive maintenance that all such boards, charged with doing public good with public funds, need to undertake before their good business starts to go bad.

96-2026

Supreme Court, U.S.
FILED
JUL 25 1997
CLERK

No. 96-1379

In The

Supreme Court of the United States

October Term, 1996

DR. MARVIN DUNN,

Petitioner,

vs.

MIAMI HERALD PUBLISHING CO., a Division of Knight-Ridder, Inc., a Florida corporation; and TOM DUBOCQ,

Respondents.

Petition For Writ Of Certiorari To The Third District Court Of Appeal Of Florida

BRIEF IN OPPOSITION

SANFORD L. BOHRER*
Florida Bar No. 160643
JUDITH M. MERCIER
Florida Bar No. 0032727
HOLLAND & KNIGHT LLP
701 Brickell Avenue
Suite 3000
Miami, FL 33131
Tel. (305) 374-8500

Counsel for Respondents

* *Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

61PP

QUESTION PRESENTED

Whether the Florida district court of appeal erred in affirming a summary judgment against Petitioner, a public figure, on a record which showed there was no basis on which a jury could be clearly convinced Respondents had knowingly or recklessly published a false statement of fact about Petitioner.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

REASONS WHY THE PETITION SHOULD BE DENIED 12

THE DISTRICT COURT'S DECISION WITHOUT OPINION DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT ON THE "OPINION" ISSUE, AND ON THE WHOLLY INDEPENDENT GROUNDS OF TRUTH OR FALSITY AND CONSTITUTIONAL "ACTUAL MALICE", THE FLORIDA TRIAL COURT APPLIED THE CORRECT STANDARD AND THE DISTRICT COURT OF APPEAL SIMPLY AFFIRMED WITHOUT OPINION 12

A. THERE IS NO BASIS FOR INFERRING A CONFLICT BETWEEN THE DISTRICT COURT OF APPEAL'S DECISION AND ANY DECISION OF THIS COURT RELATING TO STATEMENTS OF OPINION 12

B. THE TRIAL COURT PROPERLY RULED THAT THE RECORD SHOWED (1) THE STATEMENTS WERE TRUE AND, ASSUMING THEM TO BE FALSE AND VIEWING THE EVIDENCE MOST FAVORABLY TO DR. DUNN, (2) DR. DUNN COULD NOT SHOW WITH CONVINCING CLARITY THAT EITHER STATEMENT WAS MADE WITH KNOWLEDGE OR RECKLESS DISREGARD OF SUCH FALSITY 15

TABLE OF CONTENTS – Continued

Page

1. The Article Statement is True – The Academy board asked Dr. Dunn to resign after hearing an auditor describe the awful condition of the financial records, a condition properly characterized as "shambles." 16

2. There is no basis in the record for a jury to be clearly convinced that the Article Statement – assuming it to be false – was published with knowledge of its falsity or with reckless disregard of the truth 17

3. Assuming the Editorial Statement to be a statement of fact, there is no basis for finding it to be false..... 17

4. There is no basis in the record for a jury to find by clear and convincing evidence that the Editorial Statement (assuming it to be false) was published with knowledge or reckless disregard of such falsity..... 18

CONCLUSION 19

TABLE OF AUTHORITIES

Page

CASES

Applestein v. Knight Newspapers, Inc., 337 So. 2d 1005 (Fla. 3d DCA 1976) 11

Coleman v. Collins, 384 So. 2d 229 (Fla. 5th DCA 1980) 15

J.D. Hill v. Lakeland Ledger Publishing Corp., 231 So. 2d 254 (Fla. 2d DCA 1970) 18

Masson v. New Yorker Magazine, 501 U.S. 496 (1991) 16, 17

Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990) 12, 13, 14

Palm Beach Newspapers, Inc. v. Early, 334 So. 2d 50 (Fla. 4th DCA 1976), *rev. denied*, 354 So. 2d 351 (Fla. 1977), *rev. denied*, 410 U.S. 980 (1978) 15

Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986) 12, 15, 16

Scandinavian World Cruises v. Ergle, 525 So. 2d 1012 (Fla. 4th DCA), *rev. denied*, 536 So. 2d 244 (Fla. 1988) 15

Slomowitz v. Walker, 429 So. 2d 797 (Fla. 4th DCA 1983) 11

Stembridge v. Mintz, 652 So. 2d 444 (Fla. 3d DCA 1995) 12, 13, 14

United States. v. Johnston, 268 U.S. 220 (1925) 13

Woodard v. Sunbeam Television Corp., 616 So. 2d 501 (Fla. 3d DCA 1993) 18

STATEMENT OF THE CASE

Petitioner Marvin Dunn ("Dr. Dunn") fails accurately and fairly to present the case to the Court. Dr. Dunn, an admitted public figure, was Principal of the Academy for Community Education (the "Academy"), an alternative school educating Dade County, Florida public school students using Dade County teachers paid by Dade County on property owned by Dade County. The Academy operated on public funds. Dr. Dunn was paid with public funds. As Principal, Dr. Dunn was responsible for "ensuring that the public funds provided were spent and accounted for in accordance with the rules applicable to the operation of entities with public funds." (Affidavit of Julio Buzzi, at ¶ 3; Appendix ["A___"] A7). After first asking him to resign and unsuccessfully attempting to negotiate an amicable resignation, the board of directors of the Academy terminated Dr. Dunn in July, 1993. (A26). This action arises out of a **Miami Herald** article reporting about the Academy's board meeting which resulted in the board's request that Dr. Dunn resign, and a **Miami Herald** editorial commenting on Dr. Dunn's dismissal.

The Statements at Issue

The Article

A July 10, 1993 **Miami Herald** article (the "Article") reported that "Directors of the Academy for Community Education voted late Thursday to seek Dunn's resignation after an auditor told them the school's financial books are a shambles." (A1). This statement (the "Article Statement") is the only statement in the Article sued

upon by Dr. Dunn. Dr. Dunn did not sue over the following statements, which immediately preceded the Article Statement:

Headline:	Principal's resignation sought
Sub-Headline:	Academy misuse of funds alleged
Lead Sentence:	Marvin Dunn . . . is being pressured to resign his school-principal job amid allegations that he mismanaged tax money intended to help troubled students.

(A1).

The Article also reported – without complaint by Dr. Dunn – that the auditor "found" "financial records were in disarray, and mandatory IRS filings had not been filed. Lots of expenditures – including gifts, bonuses and loans to employees – were lacking supporting documentation." (A3)

The Article Statement has two parts. The first is the statement that the board voted to seek his resignation after hearing from the Academy's auditor. There is no dispute about this in the record. The second part is the report that the "auditor told them [the board members] the school's financial books are a shambles." Respondent Tom Dubocq, the **Miami Herald** reporter who wrote the Article, chose the word "shambles" "because [he] thought it best expressed for the **Herald**'s readers what Mr. Buzzi [the auditor] was saying, orally and in his Audit report, about the condition of the school's financial records." (Dubocq Affidavit at ¶ 4, (A17)).

The Auditor Testified The Article Was True

Julio Buzzi, the Academy auditor referred to in the Article, testified that "shambles" accurately reflected the condition of the financial records:

> While I do not recall using the word – "shambles" to describe the financial records of the Academy, at the time I read the article using that word and today I believe "shambles" is an accurate word to use to describe to the public the condition of those financial records.

(Buzzi Affidavit at ¶ 10, (A12)). Mr. Buzzi substantiated this testimony with facts about how the Academy was financially operated under Dr. Dunn's management:

> a. The Academy failed to maintain a fund accounting system that allowed for proper classification of expenses by fund.
>
> b. The Academy did not have an adequate formal costs allocation policy.
>
> c. The Academy expended certain grant funds in a manner that may have violated restrictive provisions of the related grants.
>
> d. The internal control structure of the Academy was deficient, and included significant deficiencies in the design or operation of the internal control structure that could adversely affect the organization's ability to record, process, summarize, and report financial data appropriately. These "reportable conditions" were noted on pages 18 to 29 of the Audit report.
>
> e. I also found reportable conditions which were so serious as to become a "material weakness."

> f. I also found material instances of noncompliance with generally accepted auditing standards and Government Auditing Standards . . . These material instances of noncompliance were noted on pages 32-34 of the Audit Report.

(Buzzi Affidavit at ¶ 5, (A8-9)). *Mr. Buzzi testified he had never audited an institution with worse record-keeping:*

I have audited many institutions using public funds, but none came close to this degree of internal control deficiencies.

(Buzzi Affidavit at ¶ 6, (A9)). Auditor Buzzi further testified that based on his knowledge of the facts about Dr. Dunn, the Article in which "shambles" appeared " 'went easy' on Dr. Dunn." (Buzzi Affidavit at ¶ 10, (A11)).

The Academy directors testified the Article Statement was true.

Five directors of the Academy testified. All agreed with Auditor Buzzi that the **Herald**'s account was true. (*See, e.g.*, Carol Von Arx Affidavit at ¶ 10, (A31)); Drucilla Burgess Affidavit at ¶ 9; Gloria White Affidavit at ¶ 10).[1]

Carol Von Arx "was the member of the board of directors of [the Academy] with particular responsibility for the Audits, in essence serving as chairperson of the

---

[1] The Affidavit of Drucilla Burgess and the Affidavit of Gloria White are substantially identical to the Affidavit of Carol Von Arx.

audit committee of the board." (Von Arx Affidavit at ¶ 4, (A28)). Ms. Von Arx testified:

> 5. As the Audit Report shows, and Mr. Buzzi's oral report to the board of directors and separate conversations with me confirmed, the Academy's financial records were not kept as they should be, and in fact were kept in such a way as to violate numerous standards for keeping such records.
>
> 6. For example, Mr. Buzzi examined a few hundred non-payroll transactions, and told us he found approximately 25% to have an internal control deficiency, which he said was as bad as anything he had seen in this regard.
>
> * * *
>
> 10. I read the articles in **The Miami Herald** reporting Dr. Dunn had been asked to resign . . . and reporting he had been fired . . . I read them in the days they were published. At the time I read the Articles, I had just finished the Audit Report, and it was my perception that the articles were accurate reports of what had happened, and if anything, understated what could have been said about Dr. Dunn. . . . While I do not recall Mr. Buzzi using the word "shambles" to describe the financial books of the Academy, I believe "shambles" is an accurate word to use to describe to the public the condition of those financial records as described to us by Mr. Buzzi.

(Von Arx Affidavit at ¶¶ 5, 6, 10, (A28, A31)).

Warren Hoskins, President of the Board, testified to the same effect, (A22-23, A25), as did the other three board members.

The Editorial

In a July 17, 1993 editorial, (the "Editorial") the **Herald** opined that "Marvin Dunn, a private school administrator who put public funds to personal use, paid the price with his job." This statement ("Editorial Statement") included the facts on which it was based: "paying a former political aide to teach his classes at Florida International University," financing "a long weekend in San Francisco with the academy's assistant principal and her daughter *after* an academic conference ended,"[2] purchasing "tickets to private dinners," and illegal political campaign contributions. The **Herald** opined that Dr. Dunn's use of public funds for personal purposes cost him his job, and the board of directors, the people who fired Dr. Dunn, as well as the auditor, testified the Editorial is true.

The Auditor and Board Members Testified The Editorial Statement Was Accurate

The unrefuted testimony of auditor Buzzi and the Academy's directors was that the Editorial Statement was true, or, if anything, "went easy" on Dr. Dunn. (*E.g.*, Buzzi Affidavit at ¶ 11, (A12); Von Arx Affidavit at ¶ 11, (A31); White Affidavit at ¶ 9; Burgess Affidavit at ¶ 11)).

Mr. Buzzi testified:

> 8. Although it was not part of my engagement, I came upon a number of instances in

---

[2] The Editorial, like the Article, did not report the fact that the assistant principal's daughter is also Dr. Dunn's daughter. At the time of the trip and at the time of conception, Dr. Dunn was married with four children.

which I believed Dr. Dunn had used the public funds provided to fund the Academy for his personal purposes . . . I did not include all of the instances of what I perceived to be personal use in the Audit Report, as the purpose of the Audit Report was not to identify deficiencies in the manner in which public funds were spent and accounted for. Examples of the uses I found which I believed to be personal uses by Dr. Dunn, some of which, as indicated below, were noted in the Audit Report, are:

a. Gas bills were charged to the Academy, signed not by Dr. Dunn but by members of his family, including children. (Audit Report, p. 22).

b. Dr. Dunn's personal van was used on a trip. Although asked, Dr. Dunn failed to provide substantiation for what he charged for the use of his van, and in seeking monies for the use of the van, he sought "reimbursement" for purchasing tires for his personal van, not for the fair rental value of the van. (Audit Report, p. 23).

c. Dr. Dunn charged the Academy for meals at restaurants as well as for delivery charges for food delivered to the school, all without substantiation to show why such expenses were not personal. (Audit Report, p. 20).

d. Dr. Dunn used the Academy's funds to make political contributions. Political contributions are prohibited for institutions such as the Academy. (Audit Report, pp. 21, 34).

e. Dr. Dunn and his assistant Andrea Loring went on a trip together to California, after which Dr. Dunn spent three days at the Academy expense at a hotel, "networking." Dr. Dunn

caused the Academy to reimburse Ms. Loring for a $42. parking ticket she incurred on the trip. (Audit Report, p. 21).

f. On a few occasions, Ms. Loring's ex-husband, Robert Loring, was paid by the Academy to cover Dr. Dunn's classes at Florida International University. (Audit Report, pp. 19-20).

g. Academy staff members performed FIU related tasks, such as compiling student grades or grading student papers during working hours. (Audit Report, pp. 19-20).

h. Dr. Dunn's use of the Academy's corporate American Express card without substantiating expenses charged to the Academy lead me to believe that he may have used the Academy charge card for personal use. (Audit Report, p. 21).

9. I told members of the board of the Academy that it was my belief, barring evidence to the contrary, that Dr. Dunn had used Academy monies, that is, public funds, for his personal purposes.

11. I read the July 17, 1993 editorial in **The Miami Herald** published after Dr. Dunn was terminated by the Academy board. A copy of the editorial is attached as Exhibit 4. At the time, as with the articles, I believed the editorial went easy on Dr. Dunn and the editorial appeared to me to be accurate. I had extensive communications with the board of the Academy, and listened to discussions between and among board members, and it is my perception, based solely on the conversations to which I was privy, that had Dr. Dunn not engaged in so many instances of apparently using public funds for personal

> purposes or being unable to show the expenditures were for legitimate Academy purposes, he would not have lost his position.

(Buzzi Affidavit at ¶¶ 8, 9, 11, (A9-12)).

Board members testified that the Editorial Statement as well as the entire Editorial was "a fair and accurate report of the events surrounding Dr. Dunn's dismissal." Thus, as Ms. Burgess, Ms. Von Arx, and Ms. White testified, "the editorial accurately states that Dr. Dunn paid with his job for his personal use of public funds." (Von Arx Affidavit at ¶ 11, (A31-32)); White Affidavit at ¶ 11; Burgess Affidavit at ¶ 11).

Nancy Ancrum, a member of the **Herald**'s Editorial Board, wrote the Editorial, which was edited by **Herald** Editor Jim Hampton. There are no facts in the record indicating either Ancrum or Hampton had knowledge of anything indicating the Editorial Statement or any other part of the Editorial was false in any regard. Ms. Ancrum testified without challenge that she believed what she wrote was true:

> 2. . . . [T]he [July 10, 1993] article reported facts about Dr. Dunn which led me to believe Dr. Dunn made personal use of public funds. . . . My perception was confirmed by the statement of Janet McAliley, then the chairperson of the Dade County School Board, who is quoted in the article as saying "It is of concern to me. Public dollars should not be spent on personal expenses." I believed then and believe today that she based her statement on what Mr. Dubocq reported in the article. . . .

* * *

> 4. . . . In addition to reading the two articles, I spoke to Ms. McAliley and Dr. Dunn, and while I do not recall much detail of what they said to me, nothing they said was inconsistent with what was reported in the articles and what I believed to be true. Had either of them reported to me facts which lead me to doubt the accuracy of anything I wrote, I would have resolved my doubt prior to writing. However, neither of them reported any such facts to me. . . . I believed [the Editorial Statement] to be true at the time it was published and believe it to be true today, after re-reading the two articles, the editorial, the accountants' reports, and the affidavits of the auditor and three members of the Academy's board of directors.

(A13-14).

The Trial Court's Summary Judgment Order

On this record, the trial court rendered summary judgment. While it based its decision on the Editorial Statement in part on its view that the statement was protected fair comment/opinion, it also based its decision on both statements on its determination that the record was without issue as to the truth of the statements and the lack of constitutional "actual malice" (knowing or reckless publication of a false statement of fact):

> The record indicates without issue that both statements sued upon are true statements of fact, which means Defendants are entitled to summary judgment. A cause of action for defamation cannot be sustained if the statements

> giving rise to the claim are true. *See, e.g., Applestein v. Knight Newspapers, Inc.*, 337 So. 2d 1005 (Fla. 3d DCA 1976) and *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986). Defendants are also entitled to summary judgment even if a false statement of fact had been published, because the record indicates, assuming the statements at issue to be false, and viewing the evidence most favorably to Dunn, that neither statement was made with knowledge or reckless disregard of such falsity, and Dunn cannot show with convincing clarity such knowing or reckless behavior. (See *Slomowitz v. Walker*, 429 So. 2d 797, 800 (Fla. 4th DCA 1983), defining clear and convincing to be evidence "of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.")

(A35-36).

The district court of appeal affirmed.

REASONS WHY THE PETITION SHOULD BE DENIED

THE DISTRICT COURT'S DECISION WITHOUT OPINION DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT ON THE "OPINION" ISSUE, AND ON THE WHOLLY INDEPENDENT GROUNDS OF TRUTH OR FALSITY AND CONSTITUTIONAL "ACTUAL MALICE", THE FLORIDA TRIAL COURT APPLIED THE CORRECT STANDARD AND THE DISTRICT COURT OF APPEAL SIMPLY AFFIRMED WITHOUT OPINION.

A. THERE IS NO BASIS FOR INFERRING A CONFLICT BETWEEN THE DISTRICT COURT OF APPEAL'S DECISION AND ANY DECISION OF THIS COURT RELATING TO STATEMENTS OF OPINION.

Dr. Dunn's petition is based solely on his inferences from the district court of appeal's reference without discussion to a prior district court of appeal decision construing this Court's decision in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990). Dr. Dunn says the district court's reference without discussion to *Stembridge v. Mintz*, 652 So. 2d 444 (Fla. 3d DCA 1995), indicates a conflict with this Court's decisions in *Milkovich* and *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986). There simply is no conflict. First, Dr. Dunn's petition refers only to the Editorial Statement, which leaves the record clear that all of the factual statements on which the Editorial Statement is based are conceded to be true (because not sued upon) or are true as a matter of law (res judicata). Second, nothing in *Stembridge* is in conflict with *Hepps*, which relates to a different issue (burden of proof of truth or falsity) and Dr. Dunn does not show any conflict between the decisions. Third, *Stembridge*, as applied here, does not

conflict with *Milkovich*. The Editorial Statement, based as it was on disclosed truthful statements of fact, is a classic statement of opinion protected under Florida law and the First Amendment. Finally, and most importantly, the simple truth is the reported decision from which review is sought at best indicates harmless error in this one case, because there are at least two other alternative grounds for the decisions against Dr. Dunn, neither of which is challenged in the petition: (1) the Editorial Statement (and Article Statement), assuming it to be a statement of fact, is true, and (2) the record shows, assuming publication of a false statement of fact, there was no knowing or reckless publication of it. "We do not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925).

The Editorial Statement is not a statement of fact, but instead is a non-actionable opinion in a newspaper editorial. It simply states the **Herald**'s opinion about, among other things, what it perceived to be Dr. Dunn's use of public funds for personal purposes and the impact on him and others as a result, *based entirely on facts disclosed in the Editorial itself*. In affirming the trial court, the district court of appeal cited *Stembridge v. Mintz*, 652 So. 2d 444 (Fla. 3d DCA 1995). In *Stembridge* the court held that under Florida's common law an allegedly defamatory statement in the form of an opinion may be " 'actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion.' " *Id.* at 446 (citing Section 566 of the Restatement (Second) of Torts). Contrary to the assertion in the petition, *Stembridge* did not "create[] a wholesale exemption from defamation liability" for statements of "opinion". Petition for

Writ of Certiorari at 9. There is no basis for such an assertion in that decision or in any decision citing to it. Moreover, it is clear the court in *Stembridge* was construing Florida law, not the First Amendment. Why else would it cite several Florida decisions without comment and then cite this Court's decision in *Milkovich* and refer to it as "analyzing First Amendment principles"? (652 So. 2d at 447).

The Editorial Statement *implies no facts*. To the contrary, it clearly recites the facts on which it is based. The disclosed facts on which the editorial writers based their opinion are: (1) the Board took action when told the school's accounts "were in questionable shape;" (2) Dr. Dunn was using public funds to pay someone else to teach his classes at FIU; (3) Dr. Dunn financed a weekend with his assistant principal and her child after a conference which he attended had concluded; (4) Dr. Dunn used agency funds to buy tickets to a private dinner; and (5) Dr. Dunn contributed Academy funds to political campaigns, which is prohibited by law (the Editorial stated he had since repaid this money). (*Dr. Dunn did not sue over any of these statements*). The Article reported essentially the same facts, and included a quotation by then-School Board Chairperson McAliley recognizing that those facts, if true, meant Dr. Dunn used public funds for his personal use. (A2). *Dr. Dunn did not sue over any of these statements either*. Ms. McAliley later shared her perception with the individual who wrote the Editorial. (A14). Finally, Ms. McAliley testified in this case that the facts in the Editorial, which were essentially the same as those testified by Mr. Dubocq in the Article, "indicate that public funds had been improperly used for personal,

non-public use." For the **Herald** to have published an editorial opinion saying the same thing is nothing less than fair comment, a statement of opinion which has long been non-actionable in Florida. *See, e.g., Scandinavian World Cruises v. Ergle*, 525 So. 2d 1012, 1013, 1015 (Fla. 4th DCA) (accusations of "milking the cow" or charging "too high" are statements of pure opinion based on facts contained in the article), *rev. denied*, 536 So. 2d 244 (Fla. 1988); *Coleman v. Collins*, 384 So. 2d 229, 231 (Fla. 5th DCA 1980) (article calling public official "sneaky" held privileged opinion); *Palm Beach Newspapers, Inc. v. Early*, 334 So. 2d 50 (Fla. 4th DCA 1976), *rev. denied*, 354 So. 2d 351 (Fla. 1977), *rev. denied*, 410 U.S. 980 (1978). Concluding that Dr. Dunn's mishandling of public funds cost him his job was the editorial board's opinion based on publicly disclosed facts. Thus, there was no conflict with *Hepps*, in that this record contained no statement of opinion which contained a false statement of fact or even a false connotation.

B. THE TRIAL COURT PROPERLY RULED THAT THE RECORD SHOWED (1) THE STATEMENTS WERE TRUE AND, ASSUMING THEM TO BE FALSE AND VIEWING THE EVIDENCE MOST FAVORABLY TO DR. DUNN, (2) DR. DUNN COULD NOT SHOW WITH CONVINCING CLARITY THAT EITHER STATEMENT WAS MADE WITH KNOWLEDGE OR RECKLESS DISREGARD OF SUCH FALSITY.

The trial court correctly applied the correct standard in granting the motion for summary judgment. The First Amendment requires that Dr. Dunn, a public figure,

prove Respondents published a false and defamatory statement of fact about him and clearly and convincingly prove that such statement or statements was/were published either with knowledge or reckless disregard of its/their falsity. *See, Philadelphia Newspapers, Inc. v. Hepps, supra; Masson v. New Yorker Magazine,* 501 U.S. 496 (1991). This Court has defined "reckless disregard" as "a high degree of awareness of probable falsity" or "serious doubts as to the truth" of what was about to be published. *Masson,* 501 U.S. at 510. To avoid summary judgment, there must be evidence in the record from which a jury could find such facts from "clear and convincing evidence." The Florida trial court reviewed the record to determine whether there was such evidence. Finding there was none, the trial judge granted Respondents' motion for summary judgment.

1. **The Article Statement is True – The Academy board asked Dr. Dunn to resign after hearing an auditor describe the awful condition of the financial records, a condition properly characterized as "shambles."**

The Article Statement says Dr. Dunn's resignation was sought (not that he was fired) after an auditor reported to the board that the financial books were in a shambles. *The auditor and every board member who testified on this issue has stated the statement is true.* All testified that "shambles" is an accurate word "to describe to the public the condition of those financial records as described to us by Mr. Buzzi." *See, e.g.,* (Buzzi Affidavit at ¶ 10, (A12); Hoskins Affidavit at ¶ 10, (A25); Von Arx Affidavit at ¶ 10, (A31)).

2. There is no basis in the record for a jury to be clearly convinced that the Article Statement – assuming it to be false – was published with knowledge of its falsity or with reckless disregard of the truth.

Assuming the Article Statement was false, there simply is no evidence from which a jury could have been clearly convinced that Respondents knew of such falsity, had serious doubts as to its truth, or had a high degree of awareness of the statement's probably falsity. It was the board which asked for Dr. Dunn's resignation and every board member said the statement was an accurate report. It was the auditor who looked at the records and he testified the characterization of them in the statement was accurate.

There is no reported decision anywhere in which a court, faced with such overwhelming evidence of the truth of the statements, has held there is an issue of fact for the jury on "actual malice."

3. Assuming the Editorial Statement to be a statement of fact, there is no basis for finding it to be false.

Assuming it to be a statement of fact, the Editorial Statement was true. One can assess the truth or falsity of the Editorial Statement by looking at the substance, the gist, or the sting of what was published. "Minor inaccuracies do not amount to falsity so long as 'the substance, the gist, the sting, of the libelous charge be justified.' " *Masson*, 501 U.S. at 517 (citation omitted). The defamatory information in this statement arises from the

assertion of personal use of public funds, not the firing, as it would be equally defamatory of Dr. Dunn to say he put public funds to personal use but still was not fired. Yet a review of the statements in the Editorial and the Article which Dr. Dunn did not sue over (all implicating him in the personal use of public funds) leads to only one conclusion – the reader still would conclude Dr. Dunn treated public funds as his own, even if the Editorial had not specifically said it. This is further confirmed by Dr. Dunn's concession here that the trial court correctly determined the Article Statement to be true. Indeed School Board Chairperson Janet McAliley came to that very conclusion, as reported in the Article. Under Florida law, the Editorial Statement as published would not have a "different effect on the mind of the reader from that which the pleaded truth would have produced." *Id.* (citation omitted); *see also J.D. Hill v. Lakeland Ledger Publishing Corp.*, 231 So. 2d 254, 256 (Fla. 2d DCA 1970) (affirming summary judgment in favor of newspaper publisher where article would not have produced a different effect if alleged falsities were eliminated); *see also Woodard v. Sunbeam Television Corp.*, 616 So. 2d 501, 502-503 (Fla. 3d DCA 1993) (affirming trial court's grant of summary judgment where alleged libel was substantially correct).

4. There is no basis in the record for a jury to find by clear and convincing evidence that the Editorial Statement (assuming it to be false) was published with knowledge or reckless disregard of such falsity.

As with the Article Statement, there simply was no basis for a jury to find the Editorial Statement, assuming

it to be fact, not opinion, and assuming it to be false, not true, that Respondents published with "actual malice." As with the Article Statement, all information available to the Editorial writers supported what they wrote. Thus, as with the Article, every board member and the auditor testified the Editorial, including the Editorial Statement, was true. And, as with the Article, the Editorial writers testified without challenge that they believed everything they wrote was accurate. In any event, Dr. Dunn does not even raise this issue in the petition.

CONCLUSION

For these reasons, the petition should be denied.

Respectfully submitted,

HOLLAND & KNIGHT LLP
SANFORD L. BOHRER (FBN160643)
JUDITH M. MERCIER (FBN 0032727)
P.O. Box 015441
701 Brickell Avenue
Suite 3000
Miami, FL 33131
(305) 374-8500

Attorneys for Respondents

The Article

Principal's resignation sought

Academy misuse of funds alleged

By TOM DUBOCO.
Herald Staff Writer.

Marvin Dunn, the prominent civic activist and university professor is being pressured to resign from his school-principal job amid allegations that he mis-managed tax money intended to help troubled students.

Directors of the Academy for Community Education, voted late Thursday to seek Dunn's resignation after an auditor told them the school's financial books are a shambles. At the same board meeting, Dunn reported that the academy is going broke.

Accountants and schools directors are questioning several thousand dollars in expenditures. Among them: IRS-prohibited political contributions, payments for a substitute teacher to cover Dunn's university classes, and a hotel bill for a long weekend in San Francisco last summer. The registered guests: Dunn, the academy's assistant principal and her daughter.

Dunn contended Friday that he's done nothing improper. He said he intends to resign from his $61,000-a-year academy post – but on his own terms, "once the air has been cleared."

He acknowledged some spending mistakes, but he contends the bulk of the allegations against him are unfounded and are a vendetta.

"I have not misspent any money," Dunn told The Herald. "Basically, this is a power struggle."

The academy is a small, highly regarded program for potential high school dropouts that Dunn founded a dozen years ago. It receives most of its funding from the Dade School Board.

Now the school system is hesitant to renew its $660,000-a-year contract. The district wants proof the academy's problems are cleared up.

"I don't have a full picture yet," School Board Chairwoman Janet McAliley said Thursday. "It is of concern to me. Public dollars shouldn't be spent on personal expenses."

If problems persist, McAliley said, the district may take over the program. That would be relatively simple because the academy is staffed with school system teachers, and is housed in the district's Merrick Educational Center in Coral Gables.

The academy is operated by a nonprofit company, the Institute for Innovative Intervention, which is run by board of volunteers. Dunn is the executive director.

The problems erupted early this year, when the school's former business manager complained to the directors – and was promptly ordered on administrative leave by Dunn. Dunn said she had bucked the chain of command and made unfounded allegations.

The situation went downhill from there, said Warren Hoskins, the academy's chairman. "We went from a board in January that was giving Marvin everything to a board in July that is seeking his resignation," Hoskins

said Friday. "I'm heartbroken the way this has come down to a lack of trust."

The academy's directors brought in two accountants to examine the books: They found, among other things; that financial records were in disarray, and mandatory IRS filings had not been filed. Lots of expenditures – including gifts, bonuses and loans to employees – were lacking supporting documentation, they said.

Reports of the accountants, and other school records show:

■ Monthly $200 payments to Robert Loring, a former political aide of Dunn and Assistant Principal Andrea Loring's ex-husband. Robert Loring said he performs a variety of computer services for the school. He also covers Dunn's classes at Florida International University when Dunn is tied up.

The accountants also questioned why the academy's office staff was logging grades for Dunn's college students who work as unpaid interns.

Dunn, paid $44,000 a year by FIU, said Loring rarely taught his class. He said the academy benefited from the work of his college interns.

■ A $436 bill from the Crown Sterling Suites in San Francisco for a three-day stay last August. Dunn and Assistant Principal Loring said they checked into the hotel after attending an academic conference. Dunn said he stayed in San Francisco to "network" with West Coast contacts to learn new fund-raising methods for a public housing project he's developing.

Loring said she never slept in the suite, just used the hotel's exercise room to wind down until her plane ride to Miami. "After a five-day conference, I needed a workout," she said.

The academy paid their expenses on the trip, about $2,100 for meals, jet fares, car rental and a $50 parking ticket Loring got while in California. Loring paid her child's air fare, she said.

■ About $400 in political campaign contributions. Under IRS rules, the tax-exempt school is prohibited from giving money to political candidates. Dunn said he didn't know it was illegal and will reimburse the school.

■ $70 for two tickets to a party last year for Associate Superintendent Russell Wheatley, the academy's supervisor at district headquarters. The private affair was at the exclusive Villa Woodbine in Coconut Grove.

Wheatley said he was furious that the academy paid. "I saw it as a school-related activity," said Loring, who bought the two tickets.

Dunn said that by resigning he isn't trying to escape the academy's financial difficulties, only its directors.

He said he wants to start fresh – with a new nonprofit corporation and new bosses – and take over the academy's dropout prevention program and other public service projects.

"I cannot continue to work for this organization," Dunn wrote Thursday to School Board Chairwoman McAliley. "This school is the primary focus of my professional life and that of other staff members who are demoralized. We will and must leave".

The Editorial

A school gets an education

MR. DUNN'S ACADEMY

WHEN BAD business is practiced in the name of good business, there is almost always a price to pay. When public money fuels such practices, the penalty must be all the more exacting.

Marvin Dunn, a private school administrator who put public funds to personal use, paid the price with his job. An educator who has earned the trust and respect of Dade's academic community, Mr. Dunn recently was fired as executive director of the Academy for Community Education when auditors had trouble reconciling its financial records. He had refused to resign.

The academy's board of directors had no other choice. When told that the school's accounts were in questionable shape, they took action swift and, it is hoped, remedial. Now their subsequent actions will be just as important. They aren't the first board members of a publicly funded nonprofit agency to be caught unaware by long-brewing fiscal or administrative problems.

The academy receives funding from the Dade County Schools. With some of those funds, Mr. Dunn was paying a former political aide to teach his classes at Florida International University. He financed a long weekend in San Francisco with the academy's assistant principal and her daughter *after* an academic conference ended. He bought tickets to a private dinner. He also contributed to political campaigns with money not legally available for that purpose. (He has since repaid those funds, he says.)

Mr. Dunn's errors, it appears, were ones of judgment, not of criminal intent.

Still, the School Board pays the academy $660,000 a year to help troubled, at-risk students – who may be victims of their own faulty judgment – get back on track. That mission and Mr. Dunn's actions were out of sync.

And what of the board members' mission? It is above all their responsibility *not* to be surprised by improprieties, certainly not to tolerate them, and to ensure that public funds are used frugally. For non-profit and public agencies to emblazon in red letters, "What would an independent auditor say?" atop every expense form and every check, might not be going too far to drive the point home.

The School Board, belatedly, has taken corrective action. It recently instituted measures to mandate annual audits of the private agencies with which it contracts for educational services.

Now the academy's board members are searching for a new director. They may find it an opportunity for soul-searching as well. That's a form of regular preventive maintenance that all such boards, charged with doing public good with public funds, need to undertake before their good business starts to go bad.

AFFIDAVIT OF JULIO M. BUZZI

JULIO M. BUZZI, first being duly sworn, testifies as follows:

1. I have a bachelor's degree in business administration and taxation and a master's degree in accounting, both from the University of Miami. I have been a Certified Public Accountant in the State of Florida for ten years. I have extensive experience in auditing entities operating with public funds. Unless otherwise stated, I have personal knowledge of the facts set forth in this Affidavit.

2. In April, 1993, the board of directors of the Institute for Innovative Interventions, Inc. ("III") engaged my accounting firm, Smith, Ortiz, Gomez & Buzzi, to perform a compliance audit and a financial audit (the "Audits") of the Academy for Community Education (the "Academy"), which was operated by III using public funds, for the 1992 fiscal year. I performed the Audits and rendered a report setting forth the results of the Audits. The report, entitled Financial Statements and Schedule of Financial Assistance with Independent Auditors' Report Thereon (as of December 31, 1992) (the "Audit Report"), was submitted to the board of directors in early July, 1993. A copy of the Audit Report is attached as Exhibit 1.

3. For the period of time covered by the Audits, Dr. Marvin Dunn was the Executive Director of the Academy, making him responsible for ensuring that the public funds provided to operate the Academy were spent and accounted for in accordance with the rules applicable to the operation of entities with public funds.

4. The generally accepted auditing standards required that I determine if the other financial records were kept and expenditures made in accordance with the applicable rules relating to the use of public funds. I determined that they were not. In addition, I found evidence that appeared to demonstrate that Dr. Dunn had on several occasions put some of those public funds to his personal use and on several other occasions had made expenditures which appeared to be for his personal use, but for which I did not have enough information to come to a conclusion. One reason why I was unable to come to a conclusion on those items was the unavailability of the records which should have been kept to substantiate the legitimacy of the expenditures.

5. Based on the results of the engagement, I came to the following general conclusions about how the Academy was operated under Dr. Dunn's management:

a. The Academy failed to maintain a fund accounting system that allowed for proper classification of expenses by fund.

b. The Academy did not have an adequate formal cost allocation policy.

c. The Academy expended certain grant funds in a manner that may have violated restrictive provisions of the related grants.

d. The internal control structure of the Academy was deficient, and included significant deficiencies in the design or operation of the internal control structure that could adversely affect the organization's ability to record, process, summarize, and report financial data

appropriately. These "reportable conditions" were noted on pages 18 to 29 of the Audit Report.

e. I also found reportable conditions which were so serious as to become a "material weakness."

f. I also found material instances of noncompliance with generally accepted auditing standards and Government Auditing Standards issued by the Comptroller General of the United States and the provisions of Office of Management and Budget Circular A-133, "Audits of Institutions of Higher Education and Other Nonprofit Institutions." These material instances of noncompliance were noted on pages 32-34 of the Audit Report.

6. In short, I examined a few hundred non-payroll transactions, and found approximately 25% to have an internal control deficiency. I have audited many institutions using public funds, but none came close to this degree of internal control deficiencies.

7. Dr. Dunn's transactions were typical of the problems I found. In a number of instances, no substantiation was made for the transaction, or the "substantiation" was scribbled in pencil on a scrap of paper, with nothing attached to justify the expense. I spoke to Dr. Dunn about this, but he was unable to provide sufficient evidence to account for the public monies spent.

8. Although it was not part of my engagement, I came upon a number of instances in which I believed Dr. Dunn had used the public funds provided to fund the Academy for his personal purposes. In part I came to that conclusion because Dr. Dunn was generally unable to

substantiate his explanations for why what appeared to be personal uses were in fact legitimate Academy expenses. I did not include all of the instances of what I perceived to be personal use in the Audit Report, as the purpose of the Audit Report was not to identify personal use by Dr. Dunn, but instead to identify deficiencies in the manner in which public funds were spent and accounted for. Examples of the uses I found which I believed to be personal uses by Dr. Dunn, some of which, as indicated below, were noted in the Audit Report, are:

a. Gas bills were charged to the Academy, signed not by Dr. Dunn but by members of his family, including children. (Audit Report, p. 22)

b. Dr. Dunn's personal van was used on a trip. Although asked, Dr. Dunn failed to provide substantiation for what he charged for the use of his van, and in seeking monies for the use of the van, he sought "reimbursement" for purchasing tires for his personal van, not for the fair rental value of the van. (Audit Report, p. 23).

c. Dr. Dunn charged the Academy for meals at restaurants as well as for delivery charges for food delivered to the school, all without substantiation to show why such expenses were not personal. (Audit Report, p. 20).

d. Dr. Dunn used the Academy's funds to make political contributions. Political contributions are prohibited for institutions such as the Academy. (Audit Report, pp. 21, 34).

e. Dr. Dunn and his assistant Andrea Loring went on a trip together to California, after which Dr.

Dunn spent three days at the Academy expense at a hotel, "networking." Dr. Dunn caused the Academy to reimburse Ms. Loring for a $42. parking ticket she incurred on the trip. (Audit Report, p. 21).

f. On a few occasions, Ms. Loring's ex-husband, Robert Loring, was paid by the Academy to cover Dr. Dunn's classes at Florida International University. (Audit Report, pp. 19-20).

g. Academy staff members performed FIU related tasks, such as compiling student grades or grading student papers during working hours. (Audit Report, pp. 19-20).

h. Dr. Dunn's use of the Academy's corporate American Express card without substantiating expenses charged to the Academy lead me to believe that he may have used the Academy charge card for personal use. (Audit Report, p. 21).

9. I told members of the board of the Academy that it was my belief, barring evidence to the contrary, that Dr. Dunn had used Academy monies, that is, public funds, for his own personal purposes.

10. I read the articles in The Miami Herald reporting Dr. Dunn had been asked to resign (July 10, 1993) and reporting he had been fired (July 15, 1993) from his position as Executive Director by the Academy board. Copies of the articles are attached as Exhibits 2 & 3. I read them on the days they were published. At the time I read the Articles, I had just finished the Audits and the Audit Report, and it was my perception that the articles "went easy" on Dr. Dunn. I believed the articles to be accurate

accounts of the situation. I am aware of the fact Dr. Dunn complains in this lawsuit of the use of the language "an auditor told them [the board of the Academy] the school's financial books are a shambles." While I do not recall using the word "shambles" to describe the financial records of the Academy, at the time I read the article using that word and today I believe "shambles" is an accurate word to use to describe to the public the condition of those financial records. That I was able to perform the Audits does not change that fact. My description to the board of what I found was likely more formally worded, but I do believe I used the word "disarray" or another word or words conveying that concept. I also conveyed to the board my finding that the financial records were confused and in disorder.

11. I read the July 17, 1993 editorial in The Miami Herald published after Dr. Dunn was terminated by the Academy board. A copy of the editorial is attached as Exhibit 4. At the time, as with the articles, I believed the editorial went easy on Dr. Dunn and the editorial appeared to me to be accurate. I had extensive communications with the board of the Academy, and listened to discussions between and among board members, and it is my perception, based solely on the conversations to which I was privy, that had Dr. Dunn not engaged in so many instances of apparently using the public funds for personal purposes or being unable to show the expenditures were for legitimate Academy purposes, he would not have lost his position.

/s/ Julio M. Buzzi
Julio M. Buzzi

AFFIDAVIT OF NANCY ANCRUM

Nancy Ancrum, first being duly sworn, testifies as follows:

1. I am a member of the Editorial Board of **The Miami Herald** and have been a member for four years. I wrote the July 17, 1993 editorial upon which this lawsuit is based in part. A copy of the editorial is attached to this affidavit as Exhibit 1. Unless otherwise stated, I have personal knowledge of the facts set forth in this affidavit.

2. On July 10, 1993, I read a **Miami Herald** article written by Tom Dubocq reporting that Dr. Marvin Dunn's resignation was being sought by the directors of a school which Dr. Dunn headed. A copy of the article is attached as Exhibit 2. I knew Tom Dubocq to be an excellent reporter who is careful in gathering and reporting the facts. The article reported facts about Dr. Dunn which made me believe Dr. Dunn had made personal use of public funds. The facts to which I refer are reported in the third paragraph of the article and essentially the last half of the article, beginning with the last paragraph in the first column on the second page of the article. My perception was confirmed by the statement of Janet McAliley, then the chairperson of the Dade County School Board, who is quoted in the article as saying "It is of concern to me. Public dollars should not be spent on personal expenses." I believed then and believe today that she based her statement on what Mr. Dubocq reported in the article. The facts in the article led me to believe that Dr. Dunn's resignation was being sought because of his use of public funds for personal purposes.

3. On July 15, 1993, in another article written by Mr. Dubocq, the **Herald** reported that Dr. Dunn had been fired by the board of the Academy after Dr. Dunn had refused to resign. A copy of that article is attached to this affidavit as Exhibit 3. Reading the two articles together lead [sic] me to believe Dr. Dunn's personal use of public funds lead [sic] to his firing.

4. John L. Hampton, the Editor of the **Herald**, is head of the Editorial Board and decides what editorials will go in the newspaper. He assigned me to write the editorial which Dr. Dunn is suing on. In addition to reading the two articles, I spoke to Ms. McAliley and Dr. Dunn, and while I do not recall much detail of what they said to me, nothing they said was inconsistent with what was reported in the articles and what I believed to be true. Had either of them reported to me facts which lead [sic] me to doubt the accuracy of anything I wrote, I would have resolved my doubt prior to writing. However, neither of them reported any such facts to me. I then wrote the editorial, which includes the one sentence Dr. Dunn complains of in this lawsuit: "Marvin Dunn, a private school administrator who put public funds to personal use, paid the price with his job." The facts upon which the editorial bases that statement, which were reported in more detail in Mr. Dubocq's first article, are summarized in the editorial itself. I believed that statement to be true at the time it was published and believe it to be true today, after re-reading the two articles, the editorial, the accountants' reports, and the affidavits of the auditor and three members of the Academy's board of directors.

5. I recall the discussion at the editorial board meeting regarding whether to publish the editorial. Dr. Dunn was a respected public figure in Dade County and had been a frequent contributor to the Herald's viewpoint section as a leader in the black community, and it was decided that the newspaper's obligation to speak out on public issues required the **Herald** to speak out on the issues raised by Dr. Dunn's termination.

Under penalties of perjury, I declare that I have read the foregoing affidavit and that the facts stated in it are true.

/s/ Nancy Ancrum
Nancy Ancrum

AFFIDAVIT OF TOM DUBOCQ

Tom Dubocq, first being duly sworn, testifies as follows:

1. I am a defendant in this action and I wrote the July 10, 1993 **Miami Herald** article upon which this action is based in part. A copy of the article is attached to this affidavit as Exhibit 1. Unless otherwise stated, I have personal knowledge of the facts set forth in this affidavit.

2. In April, 1993, the board of directors of the Institute for Innovative Interventions ("III") engaged the accounting firm of Smith, Ortiz, Gomez & Buzzi to perform a compliance audit and a financial audit (the "Audits") of the Academy for Community Education (the "Academy"), which was operated by III, using public funds, for the 1992 fiscal year. Marvin Dunn was the executive director of III and the head of the Academy. The accountants performed the Audits and rendered a report setting forth the results of the Audits. The report, entitled Financial Statements and Schedule of Financial Assistance with Independent Auditors' Report Thereon (as of December 31, 1992) (the "Audit Report"), was submitted to the board of directors in early July, 1993. A copy of the Audit Report is attached as Exhibit 2.

3. I reviewed drafts of the report prior to writing the Article. I spoke with the accountant who prepared the Audits and the Audit Report, Julio Buzzi. I also met or spoke with members of the board of directors regarding the Audit Report and observed Mr. Buzzi's oral presentation to the board of the directors of his Audit Report. I have seen Mr. Buzzi's affidavit, which is being filed at the same time as my affidavit, and I will not repeat here what

he says there, other than to say he indicated to me the financial books and records of the Academy were in very bad condition, with some records being kept or made on the backs of envelopes and on scraps of paper. Although I spoke to Dr. Dunn more than once before the Article was published about the record keeping issue, and met with him for approximately two hours at the school the day before the Article was published, Dr. Dunn never showed me or even offered to show me documents which would indicate what Mr. [sic] was telling me was wrong.

4. Dr. Dunn is suing me and **The Miami Herald** over our use of one word in one sentence in the July 10, 1993 article reporting Dr. Dunn's board of directors had asked him to resign. The complete sentence reads as follows: "Directors of the Academy for Community Education voted late Thursday to seek Dunn's resignation after an auditor told them the school's books are a shambles." Dr. Dunn's objection is to the use of the word "shambles." Mr. Buzzi did not use the word "shambles." What words he used were in "accountantese," by which I mean the language accountants use in audit reports. I chose the word "shambles" because I thought it best expressed for the **Herald**'s readers what Mr. Buzzi was saying, orally and in his Audit Report, about the condition of the school's financial records. In his affidavit, of course, Mr. Buzzi confirms that my use of the word was accurate and appropriate.

5. Dr. Dunn, despite being given several opportunities by me and apparently (according to Mr. Buzzi's affidavit) by Mr. Buzzi as well, relied solely on his unsupported word that Mr. Buzzi's findings and conclusions were wrong. Dr. Dunn never produced any documents to

show me the books were not in the condition Mr. Buzzi described to me and the Academy's board of directors.

6. I understand Dr. Dunn also complains of the reference in a July 17, 1993 Miami Herald editorial to his personal use of public funds while he was running the Academy. I did not write the editorial, but it is accurate. In the Article, certain statements of fact are highlighted by "bullets" which appear next to them. Dr. Dunn has not sued over those statements. I brought those facts to the attention of the Chairperson of the Dade County School Board, Janet McAliley, who responded by saying she did not yet "have a full picture," but what I was reporting to her constituted the personal use of public funds: "It is of concern to me. Public dollars shouldn't be spent on personal expenses". Obviously, if those statements were true, she perceived that as personal use of public funds.

7. Although it was not part of his engagement, and thus did not become part of his Audit Report, Mr. Buzzi told me, just as he told members of the board of directors of the Academy, that he had come upon a number of instances in which he believed Dr. Dunn had used the public funds provided to fund the Academy for his personal purposes. He told me that in part he came to that conclusion because Dr. Dunn was generally unable to substantiate his explanations for why what appeared to be personal uses were in fact legitimate Academy expenses. Mr. Buzzi said that because it was not part of his engagement, he did not include all of the instances of what he perceived to be personal use in the Audit Report, as the purpose of the Audit Report was not to identify personal use by Dr. Dunn, but instead to identify deficiencies in the manner in which public funds were spent

and accounted for. Examples of the uses he found which he believed to be personal uses by Dr. Dunn, some of which were noted in the Audit Report, are set out in Mr. Buzzi's affidavit. Because they are already in his affidavit and the Audit Report, I will not repeat them here. However, using just the California trip to the Sonoma area and then San Francisco as an example, it was obvious the trip was not strictly business: Dr. Dunn and Ms. Loring were not simply principal and assistant principal, but had been sexually involved to the extent they had a child, which the Article referred to as Loring's child. Dr. Dunn and Ms. Loring did not have separate rooms, as decorum and common sense would dictate when an unmarried woman and a married man travel together on business. Dr. Dunn and Ms. Loring did not go alone, as would people on a business trip, but took their daughter, who shared the room with them. Dr. Dunn and Ms. Loring did not return to Miami, or go their separate ways, as people on a legitimate business trip would, after the "critical thinking" conference in Sonoma ended, but instead traveled together to San Francisco, where they again shared a room with their child for the weekend. When confronted with this, both Ms. Loring and Dr. Dunn lied to me, further confirming in my mind the personal nature of this expensive trip to California. Ms. Loring lied to me by saying she did not stay or sleep in the room. She admitted the lie in her deposition in this case. Dr. Dunn lied when he claimed he was in San Francisco "networking," because he gave me the name of only one person he was "networking" with, and when I called that woman, she contradicted Dr. Dunn.

Under penalties of perjury, I declare that I have read the foregoing affidavit and that the facts stated in it are true.

/s/ Tom Dubocq
Tom Dubocq

AFFIDAVIT OF WARREN HOSKINS

Warren S. Hoskins, duly affirms and testifies as follows:

1. I was President of the Board of Directors of Institute for Innovative Interventions, Inc. ("III") during the time period covered by the complaint filed in this action and the Miami Herald article and editorial referred to in the complaint. Copies of the article and editorial are attached to this affidavit as Exhibits 1 (article) and 2 (editorial). Unless otherwise stated, I have personal knowledge of the facts set forth in this Affidavit.

2. In April, 1993, the Board of Directors of III engaged the accounting firm of Smith, Ortiz, Gomez and Buzzi to perform a compliance audit and a financial audit (the "Audits") of III and its projects, the Oasis Project ("Oasis") and the Academy for Community Education (the "Academy") which were operated by III, using public funds, for the 1992 fiscal year. Dr. Dunn was the Executive Director of III and was also employed by III as the Principal of the Academy. The accountants performed the Audits and rendered a report setting forth the results of the Audits. The report, entitled Financial Statements and Schedule of Financial Assistance with Independent Auditors' Report Thereon (as of December 31, 1992) (the "Audit Report"), was submitted to the board of directors in early July, 1993. A copy of the Audit Report is attached as Exhibit 3.

3. For the period of time covered by the Audits, Dr. Marvin Dunn was the Executive Director of III and the Principal of the Academy. In both capacities, he bore the primary responsibility for ensuring that all public funds

provided to operate III and the Academy were spent and accounted for in accordance with the rules applicable to IRS Code 501(c)(3) nonprofit organizations, and of the Dade County Public School System, and generally to the operation of entities using public funds.

4. As part of my duties as President of the Board of Directors of III, I met and spoke with Julio Buzzi, the accountant who prepared the Audits and the Audit Report. Mr. Buzzi indicated to me that he found evidence that appeared to demonstrate that Dr. Dunn had during 1992 put some of those public funds which were supposed to be used for III or the Academy to uses which were not consistent with the policies and procedures of nonprofit organizations or of the Academy, and on several occasions had made expenditures which appeared to be for his personal use, but for which Mr. Buzzi did not have enough information to come to a conclusion. Mr. Buzzi told me that records which should have been kept to substantiate the legitimacy of the expenditures were incomplete or nonexistent. Mr. Buzzi told me that Dr. Dunn had failed to keep proper financial records himself, and that he had not ensured that others kept them, in spite of his assigned responsibilities to do so.

5. As the Audit Report further shows, and Mr. Buzzi's oral report to the Board of Directors and separate conversations with me confirmed, under Dr. Dunn's direction, the III and the Academy financial records in general were not kept as they should have been, and in fact were kept in such a way as to violate numerous standards for keeping such records.

6. Mr. Buzzi reported to us that he examined a few hundred non-payroll transactions, and told us he found approximately 25% to have an internal control deficiency. When we asked if this was significantly bad, he said it was as bad as anything he had ever seen in this regard.

7. Mr. Buzzi said some of Dr. Dunn's own transactions were problematic. No substantiation was made for some transactions, and in other instances the "substantiation" was a scribbled note in pencil on a scrap of paper, with nothing attached to justify the expense. Mr. Buzzi told me and other members of the board that he spoke to Dr. Dunn about this, but that he felt Dr. Dunn was not providing sufficient evidence to account for Dr. Dunn's opinion of how the public monies had been spent.

8. Although it did not become part of his Audit Report, Mr. Buzzi told me of instances in which he believed Dr. Dunn had used the public funds provided to fund III and the Academy for his personal purposes. He told me that in part he came to that conclusion because Dr. Dunn was generally unable to document his explanations for why what appeared to be personal uses were in fact legitimate expenses. Mr. Buzzi said that because it was not part of his engagement, he did not include all of the instances of what he perceived to be personal use in the Audit Report, as the purpose of the Audit Report was not to identify personal use by Dr. Dunn, but instead to identify deficiencies in the manner in which public funds were spent and accounted for. Mr. Buzzi reported some examples of the uses he found which be believed to be personal uses by Dr. Dunn in the Audit Report:

a. Many bills for gasoline were charged to III on a card provided to Dr. Dunn for Academy business, but were signed not by Dr. Dunn but by members of his family, without indication if the vehicle or the driving was in any way related to any Academy or III business. (Audit Report, p. 22)

b. Dr. Dunn Charged III for meals at restaurants without substantiation to show why such expenses were not personal. (Audit Report, p. 20)

c. Dr. Dunn used III funds to make at least one political contribution. Political contributions are specifically prohibited for 501(c)(3) nonprofit organizations such as III. (Audit Report, pp. 21, 34)

d. On a few occasions, Robert Loring, a computer consultant to the Academy (and ex-husband of Assistant Principal Andrea Loring), was apparently paid with III funds for time spent covering Dr. Dunn's classes at Florida International University. (Audit Report, pp. 19-20)

e. Academy staff members performed FIU related tasks, such as compiling FIU student grades or grading FIU student papers during Academy working hours. (Audit Report, pp. 19-20)

f. Dr. Dunn's reported use of III's corporate American Express card without substantiating the expenses charged to III lead me to conclude that he used the Academy charge card for unapproved uses. (Audit Report, p. 21)

9. Mr. Buzzi told me and other members of the Board of III that it was his belief that Dr. Dunn had used

III monies, that is, public funds, for his own personal purposes.

10. I read the articles in **The Miami Herald** reporting Dr. Dunn had been asked to resign (July 10, 1993) (Exhibit 1) and reporting he had been fired (July 15, 1993) (Exhibit 4) from his position as Executive Director by the Academy board. I read them on the days they were published. At the time I read the Articles, I had just finished the Audit Report and talking with the accountants, and it was my perception that the Herald could have said a great deal more about Dr. Dunn's failings as a Principal and as an Executive Director of a nonprofit organization. I believed the articles to be generally accurate accounts of the situation. I am aware of the fact Dr. Dunn complains in this lawsuit of the use of the language "an auditor told them [the board of the Academy] the school's financial books are a shambles." While I do not recall Mr. Buzzi using the word "shambles" to describe the financial books of the Academy, at the time I read the article using that word and today I believe "shambles" is an accurate word to use to describe to the public the condition of those financial records as described to us by Mr. Buzzi. His description to the board of what he found was likely more formally worded, but I do recall he used the word "disarray" or words to that effect, and told us the books were confused and in disorder.

11. I read the July 17, 1993 editorial in **The Miami Herald** published after Dr. Dunn was terminated by the Academy board. A copy of the editorial is attached as Exhibit 2. The editorial is fair, and accurately summarizes events surrounding Dr. Dunn's dismissal. The editorial states that Dr. Dunn paid with his job for his personal use

of public funds. For me personally, the issue was Dr. Dunn's refusal to implement fiscal policies, and his efforts to start a competing nonprofit organization, and to divert funding to it. It was his personal agenda for the use of public funds and his unwillingness to conform that agenda to proper practice that led me to call first for his resignation, and then to ask the board to vote to terminate his employment. I believed he was using III funds for non-Academy and non-III business, and that he intended to perpetuate that practice unless stopped. I and other members of the board were upset that Dr. Dunn seemed to believe and act as if the Academy belonged to him personally, and even when he was told to change his conduct to conform to what both Mr. Buzzi and another accountant told us were the standards for non-profit corporations using public monies, he resisted, and refused to require academy staff to cooperate. For example, when check signing authority was limited to a certain amount, the amount was divided by Academy staff into a number of checks below this limit to evade the requirement that a board member approve the expenditure. We thus realized that regardless of the relatively small amounts involved at that time, Dr. Dunn had shown by his actions that he had no intention of requiring the staff to follow anyone's rules but his own.

Under penalties of perjury, I declare that I have read the foregoing affidavit and that the facts stated in it are true.

/s/ Warren S. Hoskins
Warren S. Hoskins

AFFIDAVIT OF CAROL VON ARX

Carol Von Arx, first being duly sworn, testifies as follows:

1. I was a member of the Board of Directors of Institute for Innovative Interventions, Inc. ("III") during the time period covered by the complaint filed in this action and the Miami Herald article and editorial referred to in the complaint. Copies of the article and editorial are attached to this affidavit as Exhibits 1 (article) and 2 (editorial). Unless otherwise stated, I have personal knowledge of the facts set forth in this Affidavit.

2. In April, 1993, the board of directors of III engaged the accounting firm of Smith, Ortiz, Gomez and Buzzi to perform a compliance audit and a financial audit (the "Audits") of III, of which the Academy for Community Education (the "Academy") was a part and which used public funds, for the 1992 fiscal year. Marvin Dunn was the Executive Director of III and the Principal of the Academy. The accountants performed the Audits and rendered a report setting forth the results of the Audits. The report, entitled Financial Statements and Schedule of Financial Assistance with Independent Auditors' Report Thereon (as of December 31, 1992) (the "Audit Report"), was submitted to the board of directors in early July, 1993. A copy of the Audit Report is attached as Exhibit 3.

3. For the period of time covered by the Audits, Dr. Marvin Dunn was the Executive Director of III and the Principal of the Academy, making him responsible in both capacities for ensuring that the public funds provided were spent and accounted for in accordance with

the rules applicable to the operation of entities with public funds.

4. I was the member of the board of directors of III with particular responsibility for the Audits, in essence serving as chairperson of the audit committee of the board, and as part of my duties I met and spoke with Julio Buzzi, the accountant who prepared the Audits and the Audit Report. Mr. Buzzi indicated to me that he found evidence that appeared to demonstrate that Dr. Dunn had on several occasions put some of those public funds which were supposed to be used for the Academy to his personal use and on several other occasions had made expenditures which appeared to be for his personal use, but for which he did not have enough information to come to a conclusion. He said one reason why he was unable to come to a conclusion on those items was due to Marvin Dunn's failure to keep adequate documentation to substantiate the legitimacy of the expenditures. In no small part, the lack of documentation and failure to keep sufficient records was due to Dr. Dunn's failure to keep proper financial records or ensure that others kept them.

5. As the Audit Report shows, and Mr. Buzzi's oral report to the board of directors and separate conversations with me confirmed, the Academy's financial records were not kept as they should be, and in fact were kept in such a way as to violate numerous standards for keeping such records.

6. For example, Mr. Buzzi examined a few hundred non-payroll transactions, and told us he found approximately 25% to have an internal control deficiency, which he said was as bad as anything he had seen in this regard.

7. Mr. Buzzi said Dr. Dunn's own transactions were typical of the problems he found. Mr. Buzzi told me that in a number of instances, no substantiation was made for the transaction, or the "substantiation" was scribbled in pencil on a scrap of paper, with nothing attached to justify the expense. Mr. Buzzi told me and other members of the board that he spoke to Dr. Dunn about this, but Mr. Buzzi said that Dr. Dunn was unable to provide sufficient evidence to account for the public monies spent.

8. Although it was not part of his engagement, and thus did not become part of his Audit Report, Mr. Buzzi told me he came upon some other instances in which he believed Dr. Dunn had used the public funds provided to III for his personal purposes. He told me that in part he came to that conclusion because Dr. Dunn was generally unable to substantiate his explanations for why what appeared to be personal uses were in fact legitimate III expenses. Mr. Buzzi's audit report identified deficiencies in the manner in which public funds were spent and accounted for. Though the purpose of the Audit was not to identify personal use of the funds by Dr. Dunn, Mr. Buzzi told me and the board of examples of the uses he found which he believed to be personal uses by Dr. Dunn, some of which, as indicated below, were noted in the Audit Report, and are as follows:

a. Gas bills were charged to III, signed not by Dr. Dunn but by members of his family, including children. (Audit Report, p. 22)

b. Dr. Dunn's personal van was used on a trip. Although asked, Dr. Dunn failed to provide substantiation for what he charged for the use of his van, and in

seeking monies for the use of the van, he sought "reimbursement" for purchasing tires for his personal van, not for the fair rental value of the van. (Audit Report, p. 23)

c. Dr. Dunn charged III for meals at restaurants as well as for delivery charges for food delivered to the school, all without substantiation to show why such expenses were not personal. (Audit Report, p. 20)

d. Dr. Dunn used III funds to make political contributions. Political contributions are not allowable expenses for non-profit institutions such as III. (Audit Report, pp. 21, 34)

e. Dr. Dunn and his assistant Andrea Loring went on a trip together to California, after which Dr. Dunn spent three days paid for out of Dade County School Board funds at a hotel, "networking" on non-academy related business. Dr. Dunn caused the Academy to reimburse Ms. Loring for a $42.00 parking ticket she incurred on the trip. (Audit Report, p. 21)

f. On a monthly basis, Ms. Loring's ex-husband, Robert Loring, was paid by the Academy. According to Dr. Dunn, Mr. Loring was being paid for computer work even though all computer work at the Academy was done by a different person.

g. Academy staff members performed FIU related tasks, such as compiling student grades or grading student papers during working hours. (Audit Report, pp. 19-20)

h. Dr. Dunn's use of III's corporate American Express card without substantiating expenses charged to

III led me to believe that he may have used III charge card for personal use. (Audit Report, p. 21)

9. Mr. Buzzi told me and other members of the board of III that it was his belief that Dr. Dunn had used III monies, that is, public funds, for his own personal purposes.

10. I read the articles in **The Miami Herald** reporting Dr. Dunn had been asked to resign (July 10, 1993) (Exhibit 1) and reporting he had been fired (July 15, 1993) (Exhibit 4) from his position as Executive Director by the III board. I read them on the days they were published. At the time I read the Articles, I had just finished the Audit Report, and it was my perception that the articles were accurate reports of what had happened, and if anything, understated what could have been said about Dr. Dunn. I know Dr. Dunn complains in his lawsuit of the use of the language "an auditor told them [the board of III] the school's financial books are a shambles." While I do not recall Mr. Buzzi using the word "shambles" to describe the financial books of the Academy, I believe "shambles" is an accurate word to use to describe to the public the condition of those financial records as described to us by Mr. Buzzi. I do recall he used the word "disarray" or another word or words conveying that concept, and that the books were confused and in disorder.

11. I read the July 17, 1993 editorial in **The Miami Herald** published after Dr. Dunn was terminated by the III board. A copy of the editorial is attached as Exhibit 2. The editorial is a fair and accurate report of the events surrounding Dr. Dunn's dismissal. In particular, the editorial accurately states that Dr. Dunn paid with his job for

his personal use of public funds. I and other members of the board were extremely concerned at how Dr. Dunn seemed to believed and act as if III and the Academy were his own personal business and even when he was told to change his conduct to conform to what the accountants told us were the standards he (and we as a board of directors) had to follow, he continued to do as he pleased. For example, when told his check signing authority was limited to a certain amount, he immediately proceeded to simply divide what he wanted to spend into a number of checks below his limit to circumvent the board's requirement that a board member approve the expenditure. The amount of money was not the issue; it was how the money was being handled. Had Dr. Dunn made an effort to work with the auditor and other accountant to set up and begin implementing proper accounting and document control systems, had Dr. Dunn made an effort to reimburse III for some of his personal expenses and had he not incorporated a competing organization, Institute for Innovative Interventions, II, to which he attempted to transfer III's funding, we would not have fired him.

Under penalties for perjury, I declare that I have read the foregoing affidavit and that the facts stated in it are true.

/s/ Carol Von Arx
Carol Van Arx

IN THE CIRCUIT COURT FOR THE
11TH JUDICIAL CIRCUIT, IN AND
FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO.: 94-1156 CA (30)
96 JAN 30

MARVIN DUNN,

Plaintiff,

vs.

MIAMI HERALD PUBLISHING COMPANY, a Division of Knight-Ridder, Inc., a Florida corporation; and TOM DUBOCQ

Defendants.
_____/

(Filed Jan. 30, 1996)

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

This cause came before the Court on Defendants' Motion For Summary Judgment. The Court has reviewed the entire file, including everything filed by the parties in connection with the Motion, and heard argument of counsel. The Court has viewed the evidence in the manner most favorable to Plaintiff. The Court has determined (1) there is no genuine issue of material fact, and (2) Defendants are entitled to judgment as a matter of law for the reasons set forth below.

1. This is an action for defamation. Plaintiff Marvin Dunn ("Dunn") bases his suit on one statement made in a July 10, 1993 **Miami Herald** article (the "Article") and one statement made in a July 17, 1993 **Miami Herald** editorial

(the "Editorial"), both relating to Dunn's loss of his position as Executive Director of a school known as the Academy for Community Education (the "Academy").

2. Plaintiff concedes he is a "public figure" under the law governing this action.

3. Although a defamation cause of action is a common law tort, under the First Amendment, special protections exist for the press where a public figure is the plaintiff. Thus, to prevail on either statement, the First Amendment to the United States Constitution requires that Dunn prove it is a false and defamatory statement of fact about him and that Defendants published such statement either with knowledge of its falsity or with "reckless disregard" of its falsity. *Masson v. New Yorker Magazine*, ___ U.S. ___, 11 S.Ct. 2419 (1991), *Lampkin-Asam v. Miami Daily News, Inc.*, 408 So.2d 666 (Fla. 3d DCA 1982), *rev. denied*, 417 So.2d 329, *cert. denied*, 459 U.S. 806 (1982). The U.S. Supreme Court has defined "reckless disregard" as "a high degree of awareness of probable falsity" or "serious doubts as to the truth" of what was about to be published. *Masson v. New Yorker Magazine, supra*. A plaintiff must prove such knowledge or recklessness with "clear and convincing evidence." *Lampkin-Asam v. Miami Daily News, Inc., supra, Bose Corporation v. Consumers Union*, 446 U.S. 485 (1984). Under the First Amendment, this Court must assure itself from an independent review of the record that "the evidence is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof" of a knowing or reckless publication of a falsehood. *Bose Corporation v. Consumers Union, supra*, 446

U.S. at 511. Finally, Florida's appellate courts have indicated summary judgment is "especially appropriate in libel cases where the facts are not essentially in dispute because of the chilling effect of libel suits on First Amendment freedoms." *Karp v. Miami Herald Publishing Co.*, 359 So.2d 580, 581 (Fla. 3d DCA 1978). See also, *Menendez v. Key West Newspaper Corp.*, 293 So.2d 751, 752 (Fla. 3d DCA 1974) ("summary judgments should be more liberally granted" in public figure libel suits); *Della-Donna v. Gore Newspapers Co.*, 510 So.2d 984 (Fla. 4th DCA 1987) ("summary judgments should be liberally granted in libel cases" "where there is a lack of clear and convincing evidence" of knowing falsity or a high degree of awareness of probable falsity); *Cronley v. Pensacola News-Journal*, 561 So.2d 402, 405 (Fla. 1st DCA 1990) ("summary judgments are to be liberally granted"). Even if it were not the case that summary judgments are to be liberally granted, the Court has determined summary judgment should be entered for the same reasons it should be entered in any lawsuit: there is no genuine issue of material fact and Defendants are entitled to judgment as a matter of law.

4. The record indicates without issue that both statements sued upon are true statements of fact, which means Defendants are entitled to summary judgment. A cause of action for defamation cannot be sustained if the statements giving rise to the claim are true. See, e.g., *Applestein v. Knight Newspapers, Inc.*, 337 So.2d 1005 (Fla. 3d DCA 1976) and *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986). Defendants are also entitled to summary judgment even if a false statement of fact had been published, because the record indicates, assuming the

statements at issue to be false, and viewing the evidence most favorably to Dunn, that neither statement was made with knowledge or reckless disregard of such falsity, and Dunn cannot show with convincing clarity such knowing or reckless behavior. (See *Slomowitz v. Walker*, 429 So.2d 797, 800 (Fla. 4th DCA 1983), defining clear and convincing to be evidence "of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.") For example, the statement in the Article reports that the Academy's board voted to seek Plaintiff's resignation from his position at the Academy after an auditor reported to the board that the books of the Academy were in a shambles. Five board members testified in this case. All five said the statement accurately reports what they did and what the auditor communicated to them. In his testimony, the auditor said the statement accurately reports what he said. It is the same with the statement in the Editorial. The statement in the Editorial indicates Dunn used public funds for personal use and lost his job as a result. Again, the five board members testified the statement was accurate, and with regard to the assertion of personal use of public funds, the auditor's affidavit, quoting from and referring to findings in his audit reports, points out several instances of personal use and states the auditor told board members it appeared to him Dunn had made personal use of public funds. Finally, when asked by the **Miami Herald** reporter writing the Article for her reaction to some of the instances identified by the auditor, then Dade County School Board Chair Janet McAliley indicated if what was being told was true, it would be "of concern to me. Public

dollars shouldn't be spent on personal expenses." Ms. McAliley provided an affidavit supporting Defendants. The Court has considered all the evidence submitted on behalf of Dunn and found it is insufficient to enable him to prove publication of a knowing or reckless falsehood with convincing clarity.

5. Alternatively, the statement in the Editorial is a statement of opinion or fair comment, not a statement of fact. The Editorial recites a series of instances of personal use of public funds by Dunn, including instances identified by the auditor (Dunn has not sued on those statements of fact) as the basis for the statement sued upon. The statement at issue appears to be a conclusion drawn by the writer based on the facts set forth in the Editorial. An allegedly defamatory statement in the form of an opinion may be "actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion." *Stembridge v. Mintz*, 652 So.2d 444 (Fla. 3d DCA 1995). *Scandinavian World Cruises (Bahamas) Ltd. v. Ergle*, 525 So.2d 1012 (Fla. 4th DCA), *rev. denied*, 536 So.2d 244 (Fla. 1988).

6. Defendants' Motion For Summary Judgment is therefore GRANTED. The Court has entered a Final Judgment this day in Defendants' favor.

ORDERED at Miami, Florida, this 30 day of January, 1996.

Murray Goldman
CIRCUIT COURT JUDGE

Copies to:
Sanford L. Bohrer
Ira Hershkowitz